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GENERAL ASSIGNMENTS BY ONE PARTNER.

THERE is no need of citing authority for the principle, that each partner, during the existence of the partnership, has the right to dispose of its property. "It is settled," said C. J. Kent, (3 Comm. 44,) that each partner has the complete *jus disponendi* of the whole partnership interest, and is considered to be the authorized agent of the firm. "To this power, however, there are several limitations. It may be circumscribed, or taken away entirely by an agreement between the partners, which will bind not only them, but also third persons, who know of its existence, in their dealings with the firm. "Any restriction," it was said in *Hawker* v. *Bourne*, (8 Mees. & W. 710,) "which, by agreement among the partners, is attempted to be imposed upon the authority which one possesses as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons who acquire rights by its exercise, unless they know that such restrictions have been made." So, too, the power, of which we speak, cannot be exercised in any case in which fraud can be brought home to the knowledge of the person dealing with the firm.

The authority of each partner to dispose of the partnership effects, is further limited to transactions within the scope of the ordinary business of the firm. It is not always easy, it is true, to determine when a disposal of

the partnership property is to be deemed thus within the scope of the partnership business, but this question settled, the principle itself is beyond dispute.

Under this limitation, no question has arisen, perhaps, which has been open to more doubt, than the question, whether one partner, without the consent of his copartner, has the power to make a general assignment of the effects of the partnership for the benefit of creditors. The right was recognised by Chief Justice Marshall in *Anderson* v. *Tompkins*, (1 Brock. C. C. Rep. 456); in *Robinson* v. *McCrowder*, (4 McCord, S. Car. Rep. 419); and in McCullough *v.* Somerville, (8 Leigh, 496.) The *dictum* of Chancellor Walworth in *Egbert* v. *Woods*, (3 Paige, 511,) is to the same effect.

On the other hand, in *Pierpont* v. *Graham*, (4 Wash. C. C. Rep. 232,) Justice Washington doubted whether such a power existed in a partner; in *Havens* v. *Hussey*, (5 Paige, 30,) it was limited by Walworth; and was wholly rejected in *Hitchcock* v. *St. John*, (1 Hoff., N. Y. 511,) in *Kirby* v. *Ingersoll*, (1 Doug., Mich. 477,) and in *Hughes* v. *Ellison*, (5 Miss. 463.) Ch. J. Kent in his Commentaries, (III. 44, note,) and Story in his Treatise upon the Law of Partnership, (§ 1017,) hold the judgment rendered in *Hitchcock* v. *St. John* to contain the more reasonable doctrine. The question being thus still open, we venture to hope that a discussion of it may not prove uninteresting to our readers.

As we have just observed, Justice Washington, in *Pierpont* v. *Graham*, (4 Wash. C. C. Rep. 232,) in the Circuit Court of the United States doubted the right of one partner, without the consent of the others, to assign the whole of the partnership effects in such a manner as to terminate the partnership. But he declined expressing any decided opinion upon this question, deeming it unnecessary to the decision of the cause before him. In *Anderson* v. *Tompkins*, (1 Brock. 456,) Chief Justice Marshall affirmed the authority of one partner to assign all the effects of the partnership for the payment of its creditors. The case of *Harrison* v. *Sterry*, (5 Cranch, 300,) is usually cited in support of the doctrine laid down by Ch. J. Marshall; but it will be found, on examination, not to be in point, inasmuch as the assignment was not of all the partnership property, and the permission of the absent partner could be fairly presumed.

In New York, in *Egberts* v. *Wood*, (3 Paige, 519,) Chancellor Walworth said it was the better opinion, that one of the partners at any time during the existence of the partnership, could assign the partnership effects, in the name of the firm, for the payment of the debts of the company, although a preference was given to one set of creditors over another. But this was a mere dictum, expressed at the request of counsel, and wholly unnecessary to the question before him, the assignment having been made with the knowledge and approbation of the absent partner. In *Havens* v. *Hussey*, (5 Paige, 30,) one partner after the firm became insolvent made an assignment of the partnership property to two assignees, against the consent of his copartner, and against the known wishes of his copartner as expressed by his son, who was present at the assignment. "In the case of *Egberts* v. *Wood*, (3 Paige, Rep. 517,") his Honor observed, in pronouncing judgment, "I had occasion to refer to most of the cases relative to assignments of partnership effects made by one of the copartners. And I then arrived at the conclusion, that from the nature of the contract of copartnership, one of the partners, during the continuance of the partnership, might make a valid assignment of the partnership effects, in the name of the firm, directly to one or more of the creditors, in payment of his or their debts, although the effect of such assignment was to give a preference to one set of creditors over another. But as it was not necessary for the decision of that case, I did not express any opinion as to the validity of an assignment of the partnership effects by one partner against the known wishes of his copartner, to a trustee, for the benefit of the favorite creditors of the assignor, in fraud of the right of his copartner to participate in the distribution of the partnership effects among the creditors, or in the decision of the question as to which of the creditors, if any, should have a preference in payment out of the effects of an insolvent concern. The present case presents that point distinctly for the decision of the court. And upon the most deliberate examination of the question, I am satisfied that the decision of the Vice-Chancellor is correct, that such an assignment is both illegal and inequitable, and cannot be sustained." In *Hitchcock* v. *St. John*, (1 Hoff. Rep. 511,) Vice Chancellor Hoffman decided against the authority of one partner to make a general assignment allowing preferences. The

power to make a sale of the partnership effects, the learned Judge argued, resides in each partner while the relation exists, and is derived from the principle that each is the agent of the whole for the purposes of carrying on the business of the firm. But a transfer of all of the effects of a firm for the payment of its debts, is a virtual dissolution of the partnership. It supersedes all the business of the firm as such, and takes from the control of each all the property with which such business is conducted. The purposes of the business, then, clearly do not require that such a power should be implied. Ch. Justice Kent in his Commentaries, and Story in his Law of Partnership, as we have already observed, have expressed their approbation of the doctrine laid down in this case by the Vice-Chancellor."[1]

In South Carolina, in *Dickinson* v. *Legare*, (1 Desauss. Eq. Rep. 537,) the Court of Chancery decided against the validity of an assignment of all the partnership effects made by one of the partners without the knowledge or consent of the other, to pay the debt of a particular creditor. In this case, one of the partners, while on a voyage to France during the revolutionary war, was taken prisoner by a British vessel and carried to England, where he was induced by a creditor living there, in order to secure his debt against the firm, to make an assignment to him of all the partnership effects. This assignment was probably void by the laws of war, and this fact, together with the coercion that may be safely presumed to have been exercised upon the assignor, undoubtedly had some effect in influencing the opinion of the court. However this may be, the decision has been overruled in the Court of Appeals in that State in *Robinson* v. *Crowder*, (4 McCord, 519.) In this case, the doctrine of *Anderson* v. *Tompkins* was maintained.[2]

It is urged by those who affirm the power of one partner to make, without the consent of his copartners, an assignment of all the partnership effects for the benefit of creditors, that such an act is within the scope of the partnership

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[1] See also *Dana* v. *Lull*, (2 Wash., Verm. 390); *Kirby* v. *Ingersoll*, (1 Doug., Mich. 477); and *Hughes* v. *Ellison*, (5 Miss. 463). *Mills* v. *Barber*, (4 Day, 428.) is not a case in point, as is usually asserted.

[2] See *McCullough* v. *Somerville*, (8 Leigh, Virg. 416); *Deckard's case*, (5 Watts. 22). In England, the question under discussion does not seem to have been raised.

business as truly as the sale of the least important article in which the partners happen to deal. "A partner may sell," said Ch. Justice Marshall, "a yard, a piece, a bale, or any number of bales. He may sell the whole of any article or of any number of articles. He may rightfully sell to his creditor, as well as for money. He may give goods in payment of a debt. If he may thus pay a small creditor, he may thus pay a large one. The quantum of debt or of goods sold cannot alter the right."

But, without attempting to define precisely (perhaps it would be impossible to do it) the limits beyond which a partner cannot go in his disposal of the partnership property, there is, it seems to us, a wide distinction between "the sale of a yard, or piece, or bale, or of any number of bales," and a general assignment of all the partnership effects. The reason why, while the former is within the scope of the business of the partnership, the latter is not, is, that such an assignment would work in effect the dissolution of the partnership. And, surely, it will not be pretended that an act which produces this effect, is a part of the ordinary business of the partnership. Can it be said, with any propriety, that a partner has an implied authority from his associates for this purpose?

Besides, a general assignment made under the circumstances we are supposing, is beyond the scope of the partnership business, because it is a fraud and invasion upon the right of the partners, who are not parties thereto, to have an equal voice in the management of the partnership concerns. It is a tyrannical exercise of power, even if it have a legal inception; it works injustice, and equity and a high-toned morality seem to require that the right to make an absolute disposal of all the partnership effects be denied to any single partner.

It has been supposed,[1] that if the assignment is made to trustees or gives preferences, this fact furnishes the only reason why its validity should be denied. But it seems unreasonable to say, that a partner can make a general assignment directly to creditors, but cannot make one to trustees in their behalf. And since assignments, which establish preferences, have been long since declared valid, it is hard to perceive why this circumstance should alone

[1] See *Hitchcock* v. *St. John*, (1 Hoff. 511); *Egbert* v. *Woods*, (3 Paige, 517; 5 Ib. 30.)

be deemed to vitiate a general assignment made by one partner without the consent of his associates.

The *time* at which the assignment was made, it may be observed here, cannot enter into our estimate of the validity of the power of a partner to make a general assignment of the partnership property. If this power, when exercised before the dissolution of the partnership, does not follow from his power to dispose of a portion of the partnership effects, how can it when exercised after dissolution? In the latter case, just as in the former, the power is beyond the scope of the business of the firm. For its exercise would work a fraud upon the right of the non-assenting partners to have a voice in the management of the affairs of the partnership.

"It is no contradiction of this doctrine," said Vice-Chancellor Hoffman in *Hitchcock* v. *St. John*, "that where the assignment is made after insolvency, and divides the funds with perfect equality among all the creditors, it will be supported. It is clear, that either partner might file a bill, obtain an injunction and receiver, and insure an equal distribution of all the funds. An assignment fairly securing the same equality is an object of favor in this court. In the absence of any indication on the part of the copartner of a contrary intention, it may well be inferred that he consents to do justice. A serious question might indeed arise in a case in which, after such an assignment by one partner, the other should make a transfer of a specific piece of property in payment of a just debt of the firm." As the question is upon the mere power of one partner to make a general assignment of the partnership effects, without the consent of his copartners, the fairness of this assignment, like that instanced by Vice-Chancellor Hoffman, ought not to prevent a Court of Equity (if our reasoning be correct) from declaring it void. "A transfer of a specific piece of property in payment of a just debt of the firm," would then stand good.

It is almost needless to say, that, although a general assignment like that under notice must be deemed invalid, it may nevertheless receive validity from the subsequent assent, express or implied, of all the partners. Thus in *Pierpont v Graham*, (4 Wash. C. C. Rep. 232,) cited in 3 Paige, 517, Judge Washington doubted the right of one of the partners, without the consent of the others, to assign the whole of the partnership effects. But he declined

expressing any decided opinion upon this question, deeming it unnecessary to the decision of the cause then before him; as, in that case, *the copartner had subsequently assented to the assignment.*

The general assignment of one partner, says Judge Story, (Part. § 101,) cannot in any way extend to real estate held by the partnership, for in such a case the partner, who executes the deed of conveyance, can transfer no more title than he possesses; and he cannot transfer the property belonging to the firm, whether it was conveyed directly to the firm or held in trust; for it belongs to the partners as tenants in common, and neither of the partners can convey more than his undivided interest.[1]

Pothier no where directly touches the point now under discussion, but the French law, in defining the power of each partner over the effects of the partnership, seems to be coincident with the common law.[2] "Dans une societè de commerce," says this last named jurist, (Trai. de Soc. 67,) "l'associè qui a l'administration peut bien vendre les marchandises de cette societè, ces marchandises n'y etant entrées que pour être revendues; mais son pouvoir ne s'etend pas jusqua pouvoir vendre la maison qui a ètè acquise pour faire le siege du commerce, ni á y imposer des servitudes: il ne peut pas même vendre les meubles qui sont dans cette maison pour y rester, comme des chaudières, des métiers et autres utensiles de commerce."

"Dans les sociétés de commerce," he continues, (No. 90,) "chacun des associés est censé s'être reciproquement donné le pouvoir d'administrer l'un pour l'autre les affaires ordinaires; comme de vendre les marchandises, acheter, payer et recevoir. En ce cas, ce que chacun fait est valable, même pour les parts de ses associés, sans qu'il ait pris leur consentement, Mais si, lors du marché que l'un des associés voudroit faire, et avant qu'il fût conclu, l'autre associè s'y opposoit, il ne pourroit pas le faire suivant cette règle de droit deja ci-dessus citée; *In re pari potiorem causam esse prohibentis constat; L.* 28, *ff. de comm. divid.*"

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[1] See *Tapley* v. *Butterfield*, (1 Metc. 518)

[2] The Roman law upon this subject is briefly summed up in these words: "*Nemo ex socus plus parte suâ potest alienare etsi totorum bonorum socii sint.*" Dig. Lib. 17, tit. 2, l. 68.

NOTES TO LEADING CASES.

PETTINGILL v. RIDEOUT, (6 N. H. Rep. 454.)

Civil Action — Felony — Merger.

The owner of goods stolen may commence a civil action for the injury before the conviction or acquittal of the party charged with the taking.

THE action is trespass for taking the plaintiff's horse. The suit was commenced December 16, 1831. The cause was tried on the general issue at the September term, 1832, where it appeared that at the February term of the court, in 1832, the defendant was convicted of stealing the horse, which was the same taking of which the plaintiff complained in this suit.

Atherton, for defendant, contended that the action could not be maintained, because it was commenced before the conviction, the civil remedy being merged in the felony until conviction. But the objection was overruled, and a verdict was found for the plaintiff. After verdict, a motion was made for a new trial, on account of the misdirection of the court.

RICHARDSON, C. J., delivered the opinion of the court. — How the civil remedy can this day be considered as merged in the felony, counsel has made no attempt to explain; nor does it seem to us to admit of explanation. In the early days of the common law, when the severity of the criminal code left in the case of felony no room for private redress, when not only the life, but the goods and chattels and lands of the offender were all forfeited, we can very easily understand how the civil remedy was merged in the felony. But at this day it is not pretended that the merger lasts beyond the time of judgment in the criminal prosecution. Before conviction, there is nothing in which the civil remedy can be merged except a suspicion of felony; and the moment this suspicion is found by a trial to be either well or ill founded, the merger ceases.

To call a suspension of the civil remedy till the criminal justice of the State is satisfied, a merger, is in our opinion very little if any thing short of an abuse of language. And in the case of *Crosby* v. *Leng*, (12 East, 409,) the rule that denies private redress until the public justice is satisfied, is placed entirely on grounds of public policy. Not a word is uttered by the court of any merger.

Does that rule exist in this State? It has not been applied in any case that we can recollect, and we can adopt it or not, as it is fitted or not to the situation and circumstances of the State. We are by no means satisfied that the rule is of any practical use in any country, and we do not believe that public justice will suffer if the civil action and the criminal prosecution go forward together. At all events, there seems to be no sound reason why the party injured should not commence his action before the conviction or acquittal of the offender. It will be enough if he is compelled to wait for a trial in his cause until the criminal prosecution is terminated. Whether even that is expedient, it will be time enough to settle when the question arises. To compel such delay, is in most cases to deny all remedy. We are therefore clearly of opinion, that it is no objection to this action that it was commenced before conviction; and judgment must be rendered on the verdict.

It was undoubtedly a principle of the ancient English common law, that the civil remedy of an individual for goods stolen from him, was materially affected by the supposed prior and superior rights of the public against the guilty party; and this effect was often described by saying that the civil remedy was merged in the felony. This language may or may not properly characterize the effect and consequence of the commission of a felony upon the private rights of the party injured; but it is perfectly clear upon the ancient authorities, that a civil action could not be sustained against the offender until he had been tried upon a criminal complaint, and final judgment had been rendered therein. *Gimson* v. *Woodful*, (2 C. & P 41: 1825) And this doctrine was held equally to apply to cases of forgery, aggravated assaults, and any other acts which then amounted to felony.

See *Cooper* v. *Witham*, (1 Levinz. 247; 1 Siderfin, 375; 2 Keble, 399: 1670,) which was case against a woman for falsely affirming herself to be sole, and thus inducing the plaintiff to marry her. See also *Higgins* v. *Butcher*, (Metcalf's Yelverton, 90 *a*, note 2.)

The reason of the rule was sometimes said to be, that if the defendant had committed a felony, he had thereby worked a forfeiture to the king of all his lands and goods, and therefore it was of no advantage to the individual to allow him a civil action, since a judgment therein could bring him no satisfaction for want of goods whereon to levy his execution; and as death was also the punishment for felony, the body of the offender could not be taken in execution. The remedy by action therefore would be entirely fruitless And a passage in Kelyng's R 48, tends to support this view. "If goods be stolen, and not waived in flight, nor seized by some of the king's officers as suspected to be stolen, then the party robbed may take his goods, or bring an action for them, although he doth not prosecute." Vide 5 Coke, R. 109.

But the most common, and probably the true ground was, not that the civil remedy was merged in the felony, and so forever gone; but that from principles of public policy, courts would not sustain private actions in such cases, until the party injured had done all in his power to bring the offender to the bar of public justice; and Lord Ellenborough, C. J., in

Crosby v. *Leng*, (12 East, 413: 1810,) thus assigns the reason of the rule: — "The policy of the law requires that before the party injured by any felonious act, can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence;" and Grose, J., assigns substantially the same reasons.

Consequently, in accordance with this latter doctrine, it has generally been held in England that if the offender had been prosecuted to conviction, the party injured might then sustain his action for damages. In *Markham* v. *Cobb*, (Noy, 82; Latch, 144; W. Jones, 147: 1625,) the action was trespass for carrying away £3000 of the plaintiff's money. The defendant pleaded that he had been indicted for the same offence and convicted, and "demanded judgment if an action should be brought against him; for *nemo debet bis puniri pro uno delicto*." But the court held the plea in bar "naught" and gave judgment for the plaintiff. *Dawkes* v. *Coveneigh*, (Styles, 346: 1652,) is precisely similar. See also *Grafton Bank* v. *Flanders*, (4 New Hamp. R. 243.) And so he might have a remedy against any one purchasing from the felon in good faith, *Peer* v. *Humphrey*, (2 Adol. & El. 495: 1835,) provided the sale was not in market overt, and so passed the property to the defendant. *Horwood* v. *Smith*, (2 Term. R. 755: 1788); and see *Harris* v. *Shaw*, (Hard. R. by Annaly, 349: 1737); *Golightly* v. *Reynolds*, (Lofft. 88: 1774.) And the same rule obtains, although the party accused was acquitted of the criminal charge, if the plaintiff was guilty of no collusion in procuring the acquittal. *Crosby* v. *Leng*, (12 East, 409.) See opinion of Bayley, J., p. 415.

If, however, the guilty party had been acquitted through the exertions of the plaintiff, this has been held in this county a perfect bar to the civil remedy. *Morgan* v. *Rhodes*, (1 Stuart, 70: 1827.) But this reason for delay of justice to the party injured, seems to have been lost sight of in the recent cases in England, or at least considered not to apply to an action against one who innocently purchases of the party committing the felony. And the modern decisions fully settle the point, that a party losing goods by theft, may sustain trover against a person purchasing of the thief, although the plaintiff had taken no steps to bring the thief to justice. *White* v. *Spettigue*, (13 Mees. & Wels. 603: 1845); *Marsh* v. *Keating*, (1 Bing. N. C. 198: 1834); *Stone* v. *Marsh*, (6 Barn. & Cress. 551: 1827.) In this latter case Lord Tenterden thus ably explained the law on this subject: —

"There is indeed another rule of the law of England, viz. that a man shall not be allowed to make a felony the foundation of a civil action; not that he shall not maintain a civil action to recover from a third and innocent party that which has been feloniously taken from him; for this he may do if there has not been a sale in market overt; but that he shall not sue the felon; and it may be admitted that he shall not sue others, together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears by his own showing to be founded on the felony of the defendant. *Gibson* v. *Minet*, (1 H. Bla. 612.) This is the whole extent of the rule. The rule is founded on a principle of public policy; and where the public policy ceases to operate, the rule shall cease also. The familiar phrase "the action is merged in the felony" is not at all times and literally true. Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender by receiving back stolen property, or any equivalent or composition for a felony without suit, and, of course, cannot be allowed to maintain a suit for such a purpose."

On this side the Atlantic the English rule has sometimes been adopted in all its rigor. Thus in *Foster* v. *Tucker*, (3 Greenl. R. 458 : 1825,) the Supreme Court of Maine said — "The principle of law is, that when a felony is committed which generally and perhaps uniformly includes a civil injury, the latter is merged in the public offence. The claims of the public are deemed paramount to those of individuals, who are not permitted even to reclaim their own property, known and identified, which has been taken possession of by the officers of justice, where a felony has been committed, unless restitution shall have been ordered by the competent authority, after the conviction of the offender, or where it may be done consistently with the public interest. After conviction, however, the purposes of public justice being accomplished, the law permits the individual injured to vindicate his rights by an apt civil remedy." And the plaintiff having brought an action of assumpsit for goods sold, and for money had and received, he was nonsuited. Although the decision in this case was probably correct, since the action being assumpsit, and the defendant a tort feasor, the form of the action was wrong: yet the court adopt and approve the rule of law above laid down. The subsequent case of *Boody* v. *Keating*, in the same court, (4 Greenl. 164 : 1826,) was however an express decision to the point. There the action was trover for a bag of money stolen by the defendant. The latter had been convicted of the larceny and sentenced, after the action was commenced, and before the trial. The court held, upon the English authorities, that the action was commenced too soon, and the plaintiff was nonsuited. Weston, J. observed — "The ancient doctrine of merger, being founded upon the feudal principle of forfeiture, and upon the paramount claims of the king, as well as from the nature of the punishment, which went to the life of the guilty party, may be considered as inapplicable here. But it is by no means so manifest that the principles of public policy, which have been the basis of the later English decisions, ought not in this country to produce the same result. . . . In support of the argument on the part of the counsel for the plaintiff, the opinion of Chief Justice Parker in *Boardman* v. *Gove et al.* (15 Mass. 336,) has been adduced. If the English doctrine as there stated by him, as we believe for sound reasons, is limited to larcenies and robberies, it was inapplicable to the case then under consideration. The opinion therefore, intimated by him, was not essential to the decision of that cause; and upon consideration, we feel ourselves constrained to regard as the better opinion, that which was given by his predecessor, Chief Justice Sewall. The public good requires that in this country, as well as in England, offenders should be brought to justice; and if the civil remedy in favor of the party injured is postponed until a public prosecution has terminated, he will be stimulated to effect this as speedily as possible. And he will be further induced to procure criminal process to search for and secure the goods stolen, which, if he continues faithful to the public interest, will be ultimately restored to him. But if he is permitted to pursue his civil remedy before conviction, there may be reason to apprehend that the claims of public justice may be disregarded, which must be considered as paramount to individual interests. Besides, until after the termination of the criminal prosecution, the law requiring that the goods should be seized and retained by the officer, it cannot be known what portion of those goods may be restored to the owner, which must necessarily affect the measure of damages in the civil action.

"It has been urged, that the conviction having taken place prior to the trial, the objection now made ought not to prevail; but the authorities to this point, adduced by the counsel for the defendant, clearly prove that the action cannot be maintained unless there was a right to prosecute it at the time of its commencement."

Crowell v. *Merrick*, (19 Maine, 392 : 1841,) adopts and acts upon the same doctrine. *Belknap* v. *Milliken*, (23 Maine, 381 : 1844) is to the same effect. The legislature of Maine, in March, 1844, passed an act giving the party redress in cases of stolen property, although the offender may not have been convicted of the theft or larceny. This statute applies to only one class of felonies, and it yet remains to be seen whether the ancient common law does not still obtain in that State, as to all civil actions in which any other felony than larceny is involved. The Supreme Court of Alabama have in one case followed the same rule. *McGrew* v. *Cato*, (Minor, 8 : 1820.) The Supreme Court of New Brunswick, also, has adopted the same doctrine, and gone still further than the English courts, denying to a party injured a remedy not only against the felon, but also against a third person, a purchaser from the original wrong-doer. *Pease* v. *McAloon*, (1 Kerr, 111 : 1840.) This case, it will be seen, is in direct conflict with *White* v. *Spettigue*, (13 Mees. & W. 613,) before cited, and decided about eight months afterwards. The court there relied principally upon *Gimson* v. *Woodful*, (2 C. & P. 41,) which has since been overruled in England. We know of but one case more in America, on this side of this question, and that is a case at *Nisi Prius*, before Sewall, C. J. of Massachusetts, (1818,) in which he nonsuited a party who had brought trover for goods stolen from him, the defendant being then under indictment for receiving the same goods, knowing them to have been stolen; but we conceive this cannot be the law of Massachusetts, for notwithstanding this case, the same court, *in banc*, held entirely different doctrines in the case of *Boardman* v. *Gove*, (15 Mass. 336 : 1819.) That action was assumpsit on a note made by the defendants payable to A., and purporting to be indorsed by A. to the plaintiff; but this indorsement the defendants had forged. This was relied upon by the defendants as a defence to the action, and theEnglish cases before cited were referred to. This defence was not sustained by the court, and Parker, C. J. after stating the doctrine as it had been held in England, and the grounds thereof, said — "These reasons do not exist with us. There is no forfeiture of lands or goods on conviction of crimes; nor is there any recompense provided by the public; nor is the criminal party punished with death. So that, in many cases, the injured party may have a remedy against the person, and in all cases against the estate, of the person who did the wrong: and this is surely better than to suffer his estate to go to his heirs, perhaps swelled by the very depredations for which it is said he is not answerable *civiliter*.

"It is laid down in Bac. Abr., tit. Action on the Case, K, that a person guilty of felony, and pardoned, or burnt in the hand, may be proceeded against in a civil action, at the suit of the party injured: although it is said that no action can be brought whilst the party is under indictment for the same crime. And the reason given is, that it might hinder all exemplary punishment: and Style, 346, is cited for this latter position. Perhaps the true position is, that until the party is pardoned, or has received the benefit of clergy, it is to be supposed that he will forfeit his life and all his estate to the king.

"But whatever may have been the reason on which the common law doctrine was founded, it is plain that the reason has ceased with us; and *cessante ratione cessat et ipsa lex*. In the few cases of felony which are punished with death here, it may be that the principle is still in force; so far as that the felon may not be sued in a civil action until after acquittal or pardon. For if convicted, he will be executed; and as all felonies include a trespass, the action dies with him. But there seems to be no reason why the injured party may not have an action for his damages

where the wrong-doer is living, and has estate sufficient to compensate the wrong."

The views here expressed were fully adopted and acted upon in Tennessee in *Ballew* v. *Alexander*, (6 Humphreys, 433 : 1846,) which was trespass for an assault and battery. Plea, that the defendant was under indictment for the same act, which was yet undetermined. Demurrer and joinder. The plea was held no defence. So in *Robinson* v. *Calp*, (1 Const. R. 231 : 1812,) the court of South Carolina approved the same doctrine, and Nott, J. assigns an additional reason why such a defence ought not to be set up, viz. that the question of a felony ought not to be tried in that collateral way.

The American doctrine, if it may be so termed, has also been approved in Connecticut, *Cross* v. *Guthery*, (2 Root, 90 : 1794) ; — in New Jersey, *Patton* v. *Freeman*, (1 Coxe, 113 : 1791) ; — Ohio, *Story* v. *Hammond*, (4 Hammond, 376) ; — in North Carolina, *Smith* v. *Weaver*, (1 Taylor, 58 ; S. C. 2 Haywood, 108 : 1799) ; and *White* v. *Fort*, (3 Hawks, 251 : 1824,) is a very able case on the subject. So in Pennsylvania, see *Piscataqua Bank* v. *Furnley*, (1 Miles, 312 : 1836.) In this case the defendant had stolen a quantity of money from the plaintiff, to recover which an action had been brought. The court held the felony to be no defence to the suit, and explained at considerable length the origin and history of the law upon the subject.

The case of *Alison* v. *Bank of Virginia*, (6 Randolph, 204 : 1828,) is also an excellent case on the same side of the question. Green, J. there said — " Upon the question, whether the felony of the principal is a bar to or a suspension, until he is prosecuted criminally, of the action on his bond, I have no doubt. I have examined with great care the English doctrine on this subject, from its origin to the present time. But, as this case is not to turn on that point, I shall not state at large the grounds of the opinion that I have formed, but confine myself to a mere summary of the result of my inquiries and reflections upon it.

" We find no trace of any thing like this doctrine in the books of the common law before the time of Hen. VI. ; but, on the contrary, Bracton, who wrote in the time of Hen. III., lays it down, that a party injured by a felony may seek redress by a civil action, or an appeal of felony, which was a criminal prosecution, at his election. Book 3, ch. 3, sec. 1. And to the same effect is Fleta, Book 1, ch. 38, sec. 1, and Book 2, ch. 1, sec. 5 — a book written in the time of Edw. II. or Edw. III. according to Lord Coke. Proem to 10 Rep. or of Edw. I. according to Selden in his edition of Fleta, p. 547. And in the 44th Edw. III , Ass. 44, 13, judgment was given for the plaintiff in an action of trespass against several for the ravishment of his wife, and taking away his goods ; which was a felony at the common law, and was then also a felony by the statute of West. 2 ; 2 Inst. 434 ; 20 Vin. Abr. 467, X. 4, Pl. 1. There is not a single adjudged case reported to this day, in which a civil action founded on a wrong amounting to a felony, has been adjudged not to lie. On the contrary, judgments have been given for the plaintiffs in many such cases, where the felon has been prosecuted and acquitted or convicted, and even where he has not been prosecuted criminally. The whole doctrine on this subject in England rests upon the *dicta* of the judges thrown out *arguendo*, and assuming various grounds as the foundation of the rule. The first of these *dicta* is to be found in the case reported in the Year Book, 31 Edw. VI., Pl. 6. That was a writ of conspiracy against several, for that they had indicted the plaintiff of an assault upon B., and beating and wounding him, &c., and feloniously stealing from his purse four shillings, of which

he was acquitted. An objection was taken to the action, that it did not lie for a conspiracy in indicting the plaintiff of an assault, battery, and wounding. To this it was answered, that all those matters being contained in one indictment, an acquittal of the felony was an acquittal of the trespass '*quia magis dignum trahit ad se minus dignum*,' and 'felony is of a higher nature than trespass,' and 'if one come to my house to rob me, and breaks my house, and takes the goods or not, the robbery and breaking of the house are one felony; and if he be acquitted of the felony he is acquitted of the trespass also.' Brooke, in abridging this case, says, 'It was agreed that if a man be indicted, arraigned, and acquitted of robbery of J. S., he shall not thereof have trespass; for, the trespass is extinct in the felony, and *omne majus trahit ad se minus. Quære inde.*' This is the origin of the rule, founded upon the doctrine of merger, and a mere dictum; and it had, if true, the effect of barring the civil action for the *tort*, under all possible circumstances. Yet, this doctrine was abandoned in the first case which occurred, of an action brought after a conviction of the defendant upon an indictment; 'because (as it was said) the party had thereby lost his remedy by appeal;' and so it has been held, that the civil action lies after an acquittal on an indictment; thus shifting the foundation of the rule from the ground that the trespass itself was merged and lost in the felony, to the other, that the inferior remedy by a civil action was merged in the superior remedy by appeal, (which was a criminal prosecution,) and allowing that when the higher remedy was lost, the inferior remedy revived. And in modern times, the judges, admitting the existence of the rule, have abandoned this latter ground also, and placed it upon the broad footing of public policy, and the interest of the public in encouraging and coercing individuals to engage in the prosecution of crimes. Indeed, there seems to be good reason for the doctrine of modern times upon this subject in England. It is in conformity with the severe spirit of their laws in respect to the prosecution and punishment of crimes, which has always urged individuals, by various inducements, to the prosecution of crimes; by the forfeiture of stolen property to the king in case of a conviction, without the intervention of the party and fresh suit on his part; or to the lord of the manor, when the property is waived by the felon and seized as waif; enlisting the passions of private revenge, by allowing an appeal at the suit of the party, in which, if there was a conviction, the king could not pardon; by making the Hundred liable, if the party made fresh suit, and hue and cry, and the felon was not arrested; but not otherwise. In all these respects, the policy and spirit of our laws are the reverse of those of the English laws. We have no appeal, in which the right to a civil action can merge. We have no forfeiture to the public of the stolen goods, or even of those of the felon; no fresh suit, or active prosecution, on the part of the injured person, is required by our laws, to entitle him to restitution. We have no law of waifs, nor any subjecting the Hundred to make satisfaction in any case; and our law, upon the whole, rather discourages than invites individual prosecutions. And I am persuaded that the object of promoting the prosecution of crimes would be more promoted by allowing the injured individual to prosecute his civil action uninterruptedly, and thus expose all the circumstances of the transaction to the officers of the law, who are bound *ex officio* to prosecute for the public, than by holding out strong inducements to both parties to compound the felony by throwing impediments in the way of the civil remedy.

"The rule in question has never been practically extended, or distinctly declared to extend to any case in which the suit was not against the felon himself, and founded on the felonious act, as the gist of the action; nor

to third persons guilty of no crime, nor to any action founded on contracts."

See also *Manro* v. *Almeida*, (10 Wheat. 494 : 1825.)

Recent American Decisions.

Supreme Court of Vermont, Grand Isle County, January, 1853.

DELANCY STOUGHTON *v.* DANFORTH MOTT.

Public Officer — Trespass — Trespasser ab initio — Pleading.

THIS was an action of trespass, to recover the value of plaintiff's sloop, wrecked in a gale on Lake Champlain, under the following circumstances. As long ago as about 1838, there was an insurrection of the French and some other portions of the inhabitants of the Canadas. The U. S. Congress passed an Act entitled the Neutrality Law, by which our citizens were prohibited from aiding, or in any way giving countenance or support to the insurgents, and declaring forfeited all arms and munitions of war about to be transported from the territories of the United States into the Canadas, and the vessels in which the same were transported, if done in violation of the statute.

In the present case the defendant justified the seizure of the munitions of war, as forfeited under the act of Congress, and the detaining the vessel for the purpose of unlading the munitions of war merely.

The plaintiff replied, that defendant had detained the vessel thence hitherto, *and converted the same to his own use*, and this was traversed and tried by the jury.

The proof was, substantially, that while a battle was raging between the insurgents and the British troops within hearing of Rouse's Point, at which was an American garrison under the command of Capt. Dimmick, of the United States' army, the plaintiff's vessel, under the command of

his brother, and with his privity, touched and cast anchor at the Point, laden with arms and munitions of war designed and on their way to aid the insurgents. The act of Congress made this contraband property liable to seizure by any collector of the customs, and by any persons by direction of the President of the U. States. At this place there were a deputy collector of the customs by the name of Crook, in the district of Champlain, N. Y., in which the property was, the defendant, who was a deputy collector in Vermont on the opposite side of the lake, and Capt. Dimmick. The defendant and Crook were requested by Capt. Dimmick to examine the suspected vessel, which they did, and reported the contraband freight to Capt. D. He requested defendant to make the seizure, which he declined doing. Dimmick then directed some one, with a sufficient force of the soldiery, to make seizure of the vessel and bring her to land, which they did, and unladed the arms and munitions of war upon the wharf. The captain of the boat then demanded her, but Capt. D. refused to surrender, and told the captain he could see to fastening the boat if he chose; which he declined doing. She was then left in the charge of the soldiers, and there arising a severe gale, the vessel became a wreck in the course of the next night. The opinion of the court sufficiently discloses the defendant's connection with the transaction.

This case being argued at this term, was held under advisement until the Circuit Term at Burlington, June, 1853, when the opinion of the Court was delivered by

Redfield, C. J. — The first report of this case is found in 13 Verm. 175, and decides, first, "the liability of the vessel to be seized," and that it may be detained ten days without warrant; but if detained longer the detention becomes unlawful, and the party may seek redress for such wrong in the State courts. But it says expressly—"Whether the remedy should be sought by trespass, or trover, is a question relating to the form of action, but cannot affect the jurisdiction of the State courts;" the only question then before the court, and therefore the propriety of the form of action was purposely left undecided. This case is next reported in 15 Verm. 162. It is there decided, that the frontier is a bit of country adjacent to the actual boundary; which really seems very unimportant, as the form of expression in the act of Congress, is, "About to pass the

frontier of the United States, for any place within any foreign state or colony conterminous with the United States;" which could not, in fact, be true to the letter, unless the design were to pass the utmost limit of the frontier, be it of more or less width. But the important point of this decision here is, that the vessel is liable to seizure without reference to the actual purpose of passing the frontier, within the foreign country, provided the officers "had probable cause to believe, and did believe, either from the character of the vessel or the quantity of arms and munitions on board, or other circumstances, that either the vessel, or the munitions of war, either by the owner thereof or any other person with his privity were to be used in carrying on any military expedition or operations within the territory of a foreign power." This declaration of the opinion of this court of the law of this case, coming from one of its most distinguished ornaments, who had had peculiar experience and knowledge on this and kindred subjects, and which was assented to at the time by a majority of the present members of the court, it would not be expected would now be received with any degree of hesitancy. And it is undoubtedly decisive, to a considerable extent, of the general merits of this case, upon any fair view of it, if the testimony detailed is all of the testimony in the case—so far at least as this defendant is concerned—unless, indeed, he can be made liable for the act of Dimmick, or those who acted under him, and Crook, in not giving up the boat immediately upon her being unladen of her contraband burden, or else in not mooring her with sufficient firmness to enable her to ride out the gale, which absolutely demolished her during the first night after the seizure. And so, it would seem, have the plaintiff's counsel regarded the law of the case since the decision in the 15th Vol., judging from their pleadings, and the course of the trial spread out at length on the present bill of exceptions. And the pleas meet fully enough the actual agency of the defendant with the transaction, except as to the purpose of the taking possession of the sloop, which it seems to us was disproved by all or most of the testimony upon both sides. And if the plaintiff had specially traversed the pleas in the form they were pleaded, the proof of the pleas, in the form of the issue, must have failed. But the point of such a special traverse, that is, the purpose of the seizure, and the time of the detention, under the circumstances of

this case and the form of the action, it will be shown hereafter, must have amounted to an immaterial issue, which the plaintiff did well not to join.

But the plaintiff, instead of demurring to defendant's plea as immaterial, (which perhaps he could not safely do, as enough is alleged to constitute a *primâ facie* defence, with other immaterial matters, which upon a traverse, certainly a special traverse, might have made it impossible for defendant to establish the issue, to the full extent, in which it was taken,) made a special replication, alleging, in substance, an abuse of the authority by which defendant acted, and a conversion of the vessel by defendant to his own use. At the argument, we were somewhat inclined to think this replication, in the form in which it was drawn, tendered an immaterial issue and amounted to a departure. But upon further consideration of the subject, and a critical examination of the cases referred to in the argument, which are all named in *The Six Carpenters' case* (8 Co. 146 *a*), and in the English and American notes to this case in 1 Smith's Leading Cases, 188 (62), we are now satisfied that the form of the replication is good. The replication contains the allegation of a positive conversion of the property to his own use by the defendant, which, according to all the authorities, makes him a trespasser *ab initio*. So that, so far as the form of the plaintiff's replication is concerned, it seems to us to be altogether according to the most approved precedents, and sufficiently suited to the purpose of raising the questions intended to be raised in regard to defendant's liability. Buller's N. P. 81; *Sir Ralph Bovey's case*, (1 Ventris, 217); *Gurgrave* v. *Smith*, (1 Salk. R. 221; *Dyer* v. *Leatherdale*, (1 Wilson, 20) — where the precise point is adjudged; as also in the case from Salkeld. And perhaps twenty more cases might be cited, where this form of pleading is sanctioned, where the plaintiff relies upon some act of defendant, making him a trespasser *ab initio*.

The great difficulty seems to be, if any, in determining what precisely it is incumbent upon the plaintiff to prove to constitute the defendant a trespasser *ab initio*. It seems to have been supposed or claimed at the trial, that the fact of defendant having admitted in the pleas his participation in the detention of the vessel up to the very moment of unlading, this should be assumed for all purposes as the basis of the proof of abuse of authority by him, and also of his being present, by his agents, at the time of the

demand by the plaintiff's agent, and the refusal by Dimmick to give up the vessel. We do not well see how the plaintiff can rely upon any fact, alleged or admitted in the pleas, to make out the abuse of authority alleged in the replication. That must be determined by the evidence introduced for that purpose. The cases all concur in saying, that in order to prove such a replication, it is necessary for the plaintiff to prove something more than a mere *nonfeasance*, a demand and refusal to give up the property, for instance. This is the very point resolved in *The Six Carpenters' case*, and is one of the distinct propositions laid down in Mr. Smith's learned note to that case, and by the American editor, Mr. Wallace, and is supported by almost all, if not in fact all the cases upon the subject, which are very numerous, and will be found elaborately collated in 1 Smith's Lead. Cas. 190–193. The case of *Jacobsohn* v. *Blake*, (Hilary Term, 1844, 6 Man. & Gr. 918; 46 Eng. C. L. Rep. 918,) is more analogous to the present than ordinarily occurs. That was an action of trespass against custom-house officers for detaining goods, under a claim that they were forfeited, and till that question should be determined by the commissioners, when it being found that they were not forfeited, the goods were surrendered and the duties accepted. But in the mean time the value of the goods had been depreciated in the market, by which the plaintiffs sustained a serious loss. The court held, that the original seizure being legal, under an authority in law given such officers, for purposes of inspection, that they could not be made trespassers short of some positive wrong, which went to show that the original taking was not for the purpose which the law recognised, but for some other indirect and unjustifiable object. And it was said, that even were the goods shown to have been detained an unreasonable time, it would not justify an action of trespass. Tindall, Ch. J. says — "Whether or not the plaintiff might have maintained an action in another form, if it could have been shown that the goods were detained an unreasonable time, we are not called upon to determine; it is sufficient to say that trespass, under the circumstances, is not maintainable." Coltman, J. says — "If the goods had been afterwards detained by them for a time more than reasonable for the examination, that might have been an abuse of their authority so as to render them liable in another form of action." This

shows very fully the sense of the profession in Westminster Hall upon this subject, long since this suit has been pending in court.

Shorland v. *Gavett*, (5 B. & C. 485; 11 Eng. C. L. R. 279) is a case where the subject seems to have received very full examination, and very fully sanctions the proposition, that even for a positive wrong, no way connected, as a necessary consequence of, and giving character to the original entry, or taking, the defendant will not be regarded as a trespasser *ab initio*. This was a case where the sheriff entered the plaintiff's dwelling-house with process to levy a certain sum, and refused to leave until a larger sum was paid him.

Gardner v. *Campbell*, (15 Johns. R. 401,) is a case where the sheriff levied upon personal property in satisfaction of an execution, and after receiving the full amount of the execution, and all charges, refused to surrender the property; and the court held that even this did not make him a trespasser *ab initio*, and that even replevin would not lie. But of the perfect soundness of this case one might perhaps doubt. And so far as this case decides that even replevin will not lie for the goods, the case is denied in *Baker* v. *Fales*, (16 Mass. R. 153,) but expressly affirmed there to be sound in holding that the defendant did not become a trespasser *ab initio* by refusal to deliver the goods. But replevin will lie for an unlawful detention, if brought in that form. But the case of *Gardner* v. *Campbell* was brought only in the *cepit* and not in the *detenit*, so that the criticism of Pitman, J. in *Baker* v. *Fales* is founded in a misconception of the case, and I cannot find that it has been otherwise questioned. And it seems to have been followed in New York in a numerous class of cases, referred to in a note to 2d ed. of 15 John. R. 402, and especially in *Mills* v. *Martin*, (19 Johns. R. 32,) and in *Gates* v. *Lownsbury*, (20 Johns. R. 427,) where it is expressly held, that "When an act is lawfully done, it cannot be made unlawful, *ab initio*, unless by some positive act incompatible with the exercise of the legal right to do the first act." Cases of this general character, all tending to support the same general proposition, that one will not be made a trespasser *ab initio* except by doing some positive wrongful act, giving character to the original act, might be multiplied almost indefinitely. It is obvious, from the slightest examination of the English books, that

this doctrine of making public officers trespassers *ab initio* is very much discountenanced of late; and upon many subjects, and among others in distress for rent, the English statutes provide that one shall not become such by reason of any irregularity in disposing of the chattels distrained. In *Shorland* v. *Gavett*, *supra*, Littledale says, in regard to this whole subject, as taking its chief origin from *The Six Carpenters' case* — "Whether there is much good sense in that case, it is unnecessary to say;" *i. e.* whether it is wise ever to have made one a trespasser by relation. We should certainly not feel disposed to extend the doctrine beyond its present somewhat circumscribed limits.

Not to employ more time in discussing the precise requisites of the law, to make one a trespasser from the beginning, it seems sufficient, for the purpose of the present case, to say, that all the cases concur in declaring that some positive act of wrong is indispensable in order to constitute one's lawful act a trespass. And in the present case, after repeated careful readings of all the evidence, I have found it impossible to discover the least scintilla of evidence, tending in the remotest degree to implicate the defendant in any positive wrongful act. If it should be assumed, that he having participated in the seizure, was bound to see to it, that the vessel or goods were regularly proceeded with, under the act of Congress, and properly taken care of in the mean time, yet the non-performance of both these duties, if it be assumed that the law casts them upon defendant, is but a mere nonfeasance, and not sufficient, according to all the cases, to make the defendant a trespasser from the beginning. The plaintiff's only remedy, in such a case, for the destruction of his boat, through want of ordinary care, would be perhaps a special action of trespass on the case, but clearly not trespass. But in regard to the necessity of any proceedings against the vessel, after it was destroyed, it would seem, to one of mere common sense and apprehension, sufficiently absurd, and perhaps not to be countenanced even by the "artificial reasoning" of the law according to my Lord Coke.

And there was certainly slight evidence, at the trial, of any want of ordinary care, even in those who had the custody of the boat. They might be and probably were deficient in skill, but under the circumstances of an almost actual conflict between the soldiery and citizens, in order to preserve the good faith of the nation towards a foreign

power with whom we were at peace, and when citizens were in a state of actual armed rebellion, and the plaintiff's vessel engaged in this resistance to the laws, and assisted in the very consummation of its contemplated violation of our national neutrality and good faith, in such a state of affairs it would certainly savor of offensive refinement, to require of the persons having the custody of the vessel, any prescribed legal measure of nautical skill in managing craft thus unceremoniously thrust upon them, in the attempted execution of the laws of the country. If they did as well as they knew how to do, it is all which could be required, one would suppose, since it was very far from being a volunteer service on their part, but rather thrown upon them by the illegal conduct of the plaintiff and his agent. And this is a rule of law of which especially the plaintiff could not complain, since no resistance was offered to the captain of the boat seeing to the fastenings, if he chose, as would seem probable from the evidence upon both sides.

What effect the interference of Captain Dimmick and his forcible control of the boat after her unlading, shall have upon the liability of his soldiery, or upon that of defendant, who for a time consented to aid in the examination and unlading of the boat, it is not needful here to discuss.

There is nothing in the proof tending to show any conversion of the vessel even by any one, for which an action would lie, except the demand of the surrender of the boat by the plaintiff's brother, the captain of the boat, and the witness who testified. The proof of defendant's agency in any detention or negligence, in regard to the fastenings, is entirely and absolutely wanting. Mott is not shown to have been upon the boat after the arms, &c. were unladed, and he is shown positively not to have been present at the time of the demand, and it is proved that the refusal was Dimmick's acting altogether as principal, and in no sense as the constructive agent of defendant. So too of the care and fastening of the boat, it was altogether that of Dimmick, if any one was responsible.

So that in every view of the defendant's conduct on the state of evidence detailed in the exceptions, it seems impossible to implicate the defendant beyond his mere agency in seizing and unlading the arms and munitions of war, which were expressly forfeited by the act of Congress, and which, of course, under the circumstances, it was made the

imperious duty of the defendant to seize and detain, and which to have evaded at the time would have been justly regarded, not only a dereliction of duty, (at all times disgraceful), but in that particular emergency a cowardly and dastardly instance of treachery and self-seeking, at the expense of his official oath and obligation, which all fair-minded men would not fail to regard as far more disastrous than any pecuniary loss or embarrassment which could possibly fall upon him, and much more to be deprecated by an honorable mind, than even the loss of life in the reasonable and prudent defence of one's country or its laws. And, lastly, these very munitions of war, which, in the first instance, were included in this suit, if we are not mistaken, are now abandoned by the plaintiff himself, as a hopeless pursuit, thus virtually confessing, that all which the defendant is shown to have done, was done with propriety as matter of duty and necessity. The judgment of the County Court, being founded upon a verdict against all the evidence, is reversed, and the case remanded to the County Court.

NOTE. — It should be borne in mind distinctly, however, that although this form of replication has been allowed, it is understood as requiring in proof something more than the ordinary presumptive evidence of a conversion of the property, from a mere demand and refusal. The proof must show some positive appropriation of the property to the use of the defendant, inconsistent with the original taking for a legal purpose. But in this case, so far from any thing of the kind appearing, the precise contrary is shown, so far as this defendant is concerned, that he did not apply it to his own use. The most that the proof tends to show is, that this defendant acted as servant of Dimmick and Crook in unlading the vessel of her contraband freight, which is now admitted on all hands to have been perfectly legal, and here he stopped. They kept the vessel over night, and by mere stress of weather, and the probable want of skill in the soldiers who were left in charge, she became a wreck. In the case of *Heald* v. *Corey*, (9 Law & Equity, Rep. 429.) tried in the Common Pleas Jan. 1852, it was held no conversion, even in defendant, although he might have pursued a somewhat irregular course with property consigned, and been guilty of possible negligence if he acted in good faith, notwithstanding the goods might, in the mean time, have been destroyed by fire, at a place where they were deposited by defendant for safe-keeping, without any other fault on his part. This is certainly very analogous to the present, upon the point of supposed negligence. Regarding Dimmick as the servant of defendant, which, as we have said, was not strictly true, even the plain truth in regard to this case is, that upon the evidence detailed, there is not the remotest ground of charging this defendant with any thing wrong in regard to the transaction. If there was any thing wrong, or any responsibility, it rested upon Captain Dimmick, as he very frankly declares in his testimony; and if made liable, there can be no doubt the government would assume the burden, in regard to which we desire to say nothing, understanding that these questions are pending in another, and, as we think, the appropriate tribunal.

Court of Common Pleas, Middlesex, ss., June Term, 1853.

COMMONWEALTH *v.* S. C. WILSON, APPELLANT.

"*Liquor Law*" *of* 1852, *8th Sect.* — *Penalty* — *Pleading.*

THIS was a complaint against the defendant under the 8th section of the act of 1852, concerning the sale and manufacture of spirituous liquors. In the complaint the defendant was described as of Chelmsford, and the offence was alleged to have been committed in that town; but it was not alleged, and did not appear where he resided when the offence was committed. After verdict, the defendant moved an arrest of judgment, because there was no allegation upon which any legal judgment could be rendered; in this, that it did not appear where the offender resided at the time the offence was committed.

The motion was argued at length.

For the Commonwealth it was contended, that the description of the defendant, as of Chelmsford, was sufficient, and that it was not necessary that the complaint should show parts upon which the court could make the right appropriation of the penalty.

For the defendant, it was argued that the eighth section, under which he was prosecuted, provided that the penalty should go to the town where the offender resided, and not to the town where the offence was committed, and that every criminal proceeding must contain enough on its face to enable a court after a verdict of guilty to pronounce a right sentence. Here, there was nothing to inform the court, or to enable them in any way so to do. The description of the party as residing in Chelmsford was not sufficient, as, in the first place, it only alleged he resided there at the time of making the complaint, and not when the offence was committed; and in the next place it was only *descriptio personæ*, which was not traversable under a plea of guilty; that whatever was necessary to be alleged in order to obtain a right judgment, must be so done that it can be put in issue by a plea to the merits of not guilty; that this was more particularly necessary, since by the 14th sect. of the 138th chap. of the Rev. Stat., a defendant could not, even by a plea in abatement, avail himself of a misstatement of the place of his residence; that the defendant was interested in the judgment, as in the first place he was the only one to be directly affected by it, and

in the next place, the penalty inured to the town in which he resided.

Hollis, C. J., remarked, that he would reserve the case for the consideration of the Supreme Court, the defendant consenting, under the 12th sect. of the 138th chap. of the Rev. Stat., as so doubtful and important as to require their decision.

C. R. Train, District Attorney, for the Commonwealth.

S. A. Brown, and *J. G. Abbott*, for the defendant.

Commonwealth v. Henry Emery, appellant.

"Liquor Law" of 1852, 8th Sect. — Jurisdiction of Justices of the Police Court, and of Justices of the Peace.

This was a complaint against the defendant for a single sale of spirituous liquors, in Lowell, under the 8th section of the Act of 1852, concerning the sale and manufacture of intoxicating liquors; commenced before Timothy Pearsons, a justice of the peace, and brought by appeal to this court. It appeared that the warrant was made in Lowell, was returnable in Lowell, and that the hearing was in Lowell, although in the copy of the judgment the magistrate is described as residing in Dracut. It was admitted that the first justice of the Lowell Police Court was an inhabitant and tax-payer of Lowell.

The defendant moved to quash, upon the ground that the magistrate before whom the complaint was made had no jurisdiction of the offence.

The motion was argued at length. In behalf of the Commonwealth it was contended, that by the express provisions of the 8th section jurisdiction was given; it being provided that the offence might be prosecuted "before any Justice of the Peace or Judge of any Police Court in the county where the offence was committed," and this being subsequent to the erection of the Police Court and the act of 1848, giving exclusive jurisdiction to that court, of offences committed in Lowell, it was the creation by statute of a new offence, which at the same time provided for the tribunal before which it should be prosecuted, and also that as the justice of the Police Court was interested as an inhabitant of Lowell in the penalty, that court could not take jurisdiction. *Pennel* v. *Atwood et al.* (13 Mass. 324,)

was cited, and also an opinion of Judge Merrick, given at the last February term of this court.

For the respondent, it was contended, that the offence being committed in Lowell, the Police Court of that city had exclusive jurisdiction, that it was competent for the Legislature to provide that interest arising from the fact of the justice being a member of a municipal corporation, interested in the question, should not disqualify him, and that in this case there was nothing to take the matter out of the general provisions of the law; although the 8th section of the act of 1852, provides that the penalty may be recovered "before any Justice of the Peace or Judge of any Police Court in the county where the offence was committed." The only sensible and legal construction was, that it meant before any magistrate having jurisdiction by the general provisions of law; the act of 1852 not being intended to interfere with, or alter the jurisdiction of courts and magistrates, but to leave that matter as it existed previously. A precisely literal construction would give jurisdiction to the Police Court, as it could not be pretended that the Legislature might not disregard a mere interest arising from a justice being an inhabitant of the city to which the penalty inured. The application of the same rule of a strictly literal construction would, under the 14th section of the same act, give a justice of the peace in Berkshire, a right to issue a search warrant on Cape Cod, as the provision there is, that the complaint may be made before "any Justice of the Peace or Judge of any Police Court," without any restriction, even to the county where the offence was committed.

It was also claimed, that under the provisions of the 33d sect. of the 87th chap. of the Rev. Stat., that whether a justice of the peace had jurisdiction or not, still that these proceedings must be quashed, as the warrant was made in Lowell and not returnable before the Police Court; the intention of that provision of the statutes being, to prevent other tribunals exercising jurisdiction within the judicial district of Lowell; and that although the statute of May 10th, 1848, giving exclusive jurisdiction to the Police Court, of all offences in that city, might not apply to this case; still a justice of the peace would not act by the provision of the Revised Statutes cited, in Lowell, but must go out of it. Precisely as a justice of Middlesex, might take jurisdiction of an offence in that county, although he

could not exercise it in Essex over the offence committed in Middlesex, so here a justice might have jurisdiction of the offence committed in Lowell, if he exercised it in a proper place; but the law forbids him to act judicially in Lowell as strongly as it did the Middlesex magistrate from acting in Essex. It was also contended, that the general policy of the law was to give jurisdiction to courts erected and appointed for their superior fitness and learning, to the exclusion of the multitude of magistrates, whose unfitness had rendered the creation of Police Courts necessary. The following authorities were cited. *Chandler's case*, (14 East, 267); 2 Gabbett's Crim. Law, 641; *State* v. *Stinson*, (5 Shepley, R. 154); *Com.* v. *Ryan*, (5 Mass. 90); *Com.* v. *Worcester*, (3 Pick. 462); *Hill* v. *Wells*, (6 Ib. 109); *Com.* v. *Nightingale*, (Thatcher's Crim. Cases, 225.)

WELLS, C. J., remarked, that the inclination of his opinion was, that the magistrate had no jurisdiction, and if the matter had not been embarrassed by the decision of another member of the court, he should have but little hesitation; but on account of that decision, the defendant consenting, he would, under the 12th sect. of the 138th chap. of the Rev. Stat., himself send the question as one doubtful and important, and report it to the Supreme Court.

The defendant consented to a verdict, and the court reported the case to the Supreme Court. There were more than one hundred cases depending on the same question, which the court ordered to be continued to await the decision of this one case; as also several indictments against the same parties.

C. R. Train, District Attorney, for the Commonwealth.

A. H. Nelson, *S. A. Brown*, and *J. G. Abbott*, for the respondent.

COMMONWEALTH *v.* M. WILSON.

"*Liquor Law*" *of* 1852, 12*th Sect.* — *Pleading* — *Variance.*

THIS was a complaint against the defendant under the 12th section of the act of 1852, concerning the sale of spirituous liquors. The indictment alleged that the defendant, at Hopkinton, in said county, between certain days, "without then and there having any license, appointment or authority therefor, first duly had and obtained according to law, was then and there a common seller of

spirituous liquors." After verdict, the defendant moved an arrest of judgment, because it was not sufficiently negatived by the pleadings that he did not possess the qualifications described in the 12th section, under which he was indicted.

The motion was argued at length.

For the Commonwealth it was urged, that the general allegation was sufficient without specifically negativing each of the provisos, and that this was in accordance with the general practice. *Carr* v. *Tower*, (8 Met. 527,) was cited.

For the defendant it was contended, that whenever there were exceptions contained in the enacting clause of the statute, they must be negatived, and not generally, as in this case, but that there must be a specific negative of each exception ; that the authorities were conclusive, and also that there was reason for the rule. In the case at bar, the allegation is merely of a conclusion of law, arising from the existence or non-existence of certain facts, which was never sufficient in criminal pleading ; the allegation is, that the defendant had "no license, &c., had and obtained according to law ;" which is a conclusion of law, following from the fact that he had not been appointed agent of the town of Hopkinton, or been authorized by the county commissioners of Middlesex county, to manufacture and sell liquors in that town. It might just as well be alleged that a person committed the crime of murder. The facts must always be alleged, and the court will establish the conclusion of law upon those facts.

It was also contended, that in the general negative of the exceptions there was a fatal variance. The statute provides, that no person shall be "a common seller, &c. without being duly appointed or authorized as aforesaid," viz. appointed as an agent of a town, or authorized by the county commissioners as a manufacturer and seller for certain purposes. The indictment alleges that the defendant was a common seller without any "license therefor," &c. ; that is, that he had no license as a common seller. But the statute makes no provision for such license ; the negative allegation does not touch the exceptions in the statute, and for any thing that appears, the defendant may be both an agent and a legal manufacturer. If an agent and manufacturer are common sellers, they cannot be punished except by removal and suits upon their bonds, which

would subject them to a much more onerous burden than the penalty under the 12th section. The following cases were cited. *Rex* v. *Earnshaw*, (15 East, 456); *Rex* v. *Jarvis*, (1 Ib. 643); *Rex* v. *Hill*, (2 Lord Raym. 1415); *Rex* v. *Pratten*, (6 T. R., 559); *Rex* v. *Baxter*, (5 Ib. 83); *Rex* v. *Jarvis*, (1 Bur. R. 148, 1 Sanders, 262 *a*, note 1.)

WELLS, C. J., remarked, that he would reserve the question for the Supreme Court, the defendant consenting, under the 12th sect. of the 138th chap. of the Rev. Stat. as so doubtful and important as to require the decision of that court.

C. R. Train, for the Commonwealth.

S. A. Brown, and *J. G. Abbott*, for the defendant.

COMMONWEALTH v. GILL.

Liquor Law — Evidence of Appointment of Town Agent.

THIS was an indictment under the 12th section of the act of 1852, concerning the sale and manufacture of spirituous liquors, and the Commonwealth did not produce the record of the selectmen of the town where the offence was committed, to show that the defendant was not appointed an agent of that town. On objection, the court ruled the proof insufficient, and the jury acquitted the defendant.

Train, for the Commonwealth.

A. H. Nelson, and *J. G. Abbott*, for the Respondent.

Circuit Court of the U. States, District of Massachusetts, September 17, 1853.

HORACE H. DAY, IN EQUITY, v. THE BOSTON BELTING CO.

Motion for Preliminary Injunction — Affidavits — Practice in Patent Cases.

Preliminary injunctions are granted simply to hold the parties in *statu quo* until their legal rights can be ascertained, and the proceedings are not on what may strictly be called legal proofs, but on affidavits alone, and no right of cross-examination.

The practice as to affidavits is, that the complainant must file his affidavits by a certain day, and the defendant his by another appointed day; and this closes the evidence.

How far opportunity would be given to the complainant to reply in case of surprise, — *Quære.*

This was an application to the court to grant an injunction against the use of the machinery used in the defendant's India rubber manufactory. The plaintiff claimed to be the owner of a patent granted to E. N. Chaffee, in 1836, for the use of machinery in preparing India rubber, and spreading it upon cloths, &c. This case at a former day had been set down for hearing at this time, and both parties had been ordered to file the affidavits of the facts upon which they relied.

Upon the coming in of the court, the counsel for Mr. Day moved the court to have the case postponed, in order that they might be prepared for the argument of the case, and said that they had not had sufficient time to read the proofs offered by the defendants.

The defendant's counsel resisted this motion, and urged that the trial should then proceed, inasmuch as it was the day fixed upon by the court at a previous day, in accordance with the request of the plaintiff's counsel, and because the proofs had been filed at the time ordered by the court.

This motion for delay was refused by the court.

The plaintiff's counsel also asked for leave to file affidavits in answer to the proofs filed by the defendants, and gave as a reason that they were taken by surprise, from the grounds taken in defence of the case.

The defendant's counsel insisted that, according to the established practice of the court, the plaintiff had no right to file affidavits in rebuttal of the affidavits filed by the defendants; that the established practice in patent cases was, for the plaintiff to file such affidavits as he relied upon, and then for the defendant to file his proofs in answer. This question was fully discussed by the counsel, and the court, Sprague, J., overruled the motion, and laid down the rule as to the practice.

The court said in substance: "According to the practice of this court, the complainant is not, as a matter of right, entitled to further time to file affidavits. The nature of this application for a preliminary injunction is peculiar. It is not a final settlement of the legal rights of the parties;

they do not come here with what are strictly to be called legal proofs, but with affidavits alone, and upon which neither party has the right of cross-examination. The object of granting a preliminary injunction is simply to hold the parties in *statu quo*, until the legal rights can be ascertained. One material question always is, and this question is of importance upon this very question of asking for delay, whether the defendants are responsible. There is no suggestion that the defendants are not amply able to respond to the plaintiff, should he ultimately recover in this case. The process of injunction is summary, and the manner of exhibiting the evidence is settled by our practice. In England the practice is to move for an injunction, *ex parte*, and there is no hearing; then the defendant moves to dissolve the injunction, and in that stage of the case, the parties are heard by the court; but even then the proofs are not open to the other side until the hearing. Here the practice is more liberal, and the affidavits are filed before the day of hearing. The rule of practice is, that the complainant must file the affidavits upon which he relies by a certain day, and then the defendant files his affidavits in reply by another appointed day, and this is the end of the evidence. I will not say that, in a case of entire surprise, an opportunity would not be given for a reply. I do not think this is such a case. I remember that when the case was first before the court, Mr. Durant gave notice to the plaintiff's counsel that he would take every possible point in the defence. I think when the plaintiff's counsel were thus notified, they should have been prepared."

After this opinion was given, the plaintiff's counsel asked for a few moments to consult upon the case, and then said they should withdraw their motion for an injunction.

The defendants then said they were very anxious for a hearing; and, although they could not prevent the plaintiff from withdrawing his motion, they would consent to his filing further proof rather than not have the question argued.

Upon this, the court said it was in the power of the plaintiff to withraw his motion, but that he might have his election to have the motion withdrawn and pay the costs, or to let the case stand for a fortnight.

The plaintiff thereupon elected to have the case stand, and it was assigned for the 30th instant.

E. F. Hodges, N. Richardson, Mr. Jenckes, of Providence, counsel for plaintiff.

H. F. Durant, for defendants.

Recent English Decisions.

[XVII. Jurist.]

Court of Exchequer, May 25, 1853.

EMMET *v.* TOTTENHAM, *p.* 509.

Bill of Exchange — Holder.

A party cannot sue on a bill of exchange in which he has no interest, and of which he has no possession.

In an action on a bill of exchange, where the plaintiff declared as first indorsee against the defendant as acceptor; the defendant traversed the indorsement, and pleaded that the plaintiff was not the holder of the bill at the time of the commencement of the suit. At the trial it appeared that the bill had, after acceptance, been indorsed by the drawer to A., who gave it to B. for value, but without indorsement, saying that he would guarantee the payment. The executor of B., unwilling to sue on the bill himself, applied to A. to see it paid; whereupon it was agreed between them and the plaintiff that the latter should sue on it in his own name; and A. accordingly took a copy of the bill from the executor, and delivered it to the plaintiff for that purpose. An action was then commenced, and the bill given to him: *Held*, that both pleas were proved.

THIS was an action on a bill of exchange, which the declaration alleged to have been drawn by one Coghlan on and accepted by the defendant, and indorsed by Coghlan to the plaintiff. The defendant pleaded, first, a traverse of the acceptance; secondly, a traverse of the indorsement; thirdly, that the plaintiff was not the holder of the bill at the time of the commencement of the suit. Issue was joined on all these pleas, as well as on several others to which it is unnecessary to refer. At the trial, before Alderson, B., it appeared that, after the bill of exchange in question had been accepted by the defendant, it was discounted for the drawer by a person of the name of Rickards, and indorsed to him generally. Rickards afterwards gave it over to Walker for value, but without indorsement, saying that he would guarantee the payment. After the death of Walker, his son and personal representative, the Rev. Dr. Walker, found this bill among his father's papers,

but being unwilling to sue on it in person, and deeming Rickards bound by his guaranty, sent an attorney to him with a request that he would see it paid. Rickards employed Emmet, the present plaintiff, to sue on it in his own name, and acquainted Dr. Walker with the fact, stating that he must have the bill to deliver to the plaintiff for that purpose. Dr. Walker then handed the bill to Rickards, who made a copy in his presence, and then gave it back, saying it would be safer in his hands until wanted. The copy thus made was delivered to Emmet, who commenced the present action. Dr. Walker shortly afterwards delivered the bill to his own attorney, to take such steps as he might judge necessary to get the money, and it was subsequently given to Emmet. On this state of facts, it being objected by the defendant's counsel that the plaintiff was not the indorsee or holder of the bill, the judge, reserving leave to move to enter a verdict for the defendant on the second and third issues, left to the jury to say if Dr. Walker was the real owner of the bill, and the plaintiff only suing for his benefit. The jury found the affirmative, and for the plaintiff generally. A rule was obtained pursuant to the leave reserved, which was argued on the 24th May.

M. Chambers and *Lush* shewed cause. — The rule has been granted on a mistaken view of the decided cases, which have been erroneously supposed to establish that the party who sues on a bill of exchange must have it in his actual manual possession. There is no authority for such a position. [Martin, B. — There is such an authority in the case of *Gill* v. *Lord Chesterfield*, which was tried before Rolfe, B., when Mr. Humfrey was counsel for the plaintiff, and I was for the defendant.] That case has not been reported, and is wholly unknown to the profession: besides which it stands alone. Constructive possession, or right to possession of the bill, is all that the law requires: and the moment the plaintiff consented to bring this action as trustee for Walker, he had a right as against him to the possession of the bill, in order to enable him to maintain the suit. At least there was evidence for the jury that the plaintiff had a constructive possession of the bill by Dr. Walker as his agent. "Where a bill is originally payable to bearer, and, therefore transferable by delivery only, actual or constructive delivery thereof would seem to be indispensable, to complete the legal title thereto. But,

where the transfer is by indorsement, there an actual or constructive delivery seems now to be deemed indispensable, to complete the title; and certainly must be so, if the transaction is not treated as consummated between the parties." (Story on Bills of Exchange, § 203.) This is strongly illustrated in the case of *Lysaght* v. *Bryant*, (9 C. B. 46.) A. and B. carried on business in partnership. The firm being indebted to C., A. (who acted as C.'s agent) with the concurrence of B., indorsed a bill of exchange to C. in the name of the firm, and placed it amongst the securities which he held for C., but no communication of the fact was made to C.: this was held a good indorsement by A. and B. to C. The cases which will be cited by the other side were cases between indorsee and indorser, where the defendant is entitled to set up a *jus tertii*, as otherwise he might, between two fires. In *Marston* v. *Allen*, (8 M. & W. 494,) for instance, the defendant had an interest in disputing the plaintiff's title. The present case, on the contrary, is an action against an acceptor, who has nothing to do with the consideration which indorsees may have given for the bill. *Sainsbury* v. *Parkinson* (18 Law T. 198, 227), will probably be much relied on. That was an action on a promissory note made by the defendant, payable to one Smith, and by him indorsed to the plaintiff. The defendant, among other pleas, traversed the indorsement. At the trial, before Pollock, C. B., the handwriting of Smith having been proved to the alleged indorsement, the defendant's counsel contended that that was insufficient, that there must be a manual delivery, and called the plaintiff as a witness, who stated — "Mr. Smith called on me and asked me to lend him my name for the purpose of enabling him to sue the defendant upon this note. I consented to do so, and I went to the office of Mr. Chappel, the attorney, whom I instructed to sue the defendant in my name. The note was never in my possession, but was handed over to Mr. Chappel by Smith, after he had indorsed it." Pollock, C. B., ruled that there was no sufficient indorsement in law, and directed a verdict for the defendant on the plea denying the indorsement, and for the plaintiff on the others, reserving the plaintiff liberty to move to enter a verdict on the former plea. A motion was made accordingly, and a rule *nisi* granted, unless the defendant would consent to the plaintiff's being nonsuited, instead of a verdict entered

for him (the defendant.) The result of that case does not appear. [POLLOCK, C. B. — I have got my own note of it. The plaintiff in his evidence said, "I am clerk of Smith. The bill was not indorsed to me before it was due, or at any time." I suppose they had, for the purposes of the action, put a name on the bill to produce it in court. "I allowed my name on the bill. I have nothing to do with the attorney." The jury found that this was not an indorsement. The court *in banc* unanimously thought my direction right, and the verdict right, and declared their intention to refuse a rule; but Mr. Crowder, by whom the case was moved, expressing a very strong opinion on the point, we said, you may take a rule for a nonsuit if you like; you can then bring a fresh action, and put the point on the record. MARTIN, B. — It is probable that the other side consented to a nonsuit being entered.] That case is not of much authority. The decisions of courts on refusing rules are of less weight than when given after argument. [MARTIN, B. — On the contrary, I think them of more weight, for it shows that the court thought the matter too clear for argument.] In that case the plaintiff incurred no liability.

Bovill, in support of the rule.

The cases of *Gill* v. *Lord Chesterfield*, and *Sainsbury* v. *Parkinson*, are authorities in point. In order to enable a man to maintain an action on a bill of exchange, he must have it in his possession as holder at the time. That is a clear definite rule, and it would create a great opening for fraud if parties were allowed to lend their names to sue on such bills. A man might be sued by twenty persons and never tell who was the holder. There was no real transfer of the bill in the present case.

POLLOCK, C. B. — Although we do not entertain much doubt on this matter, we think it better to take time to consider before giving judgment. In the event of our deciding against the plaintiff, it may become a question whether he ought not to be allowed to tender a bill of exceptions. *Cur. adv. vult.*

The judgment of the Court — consisting of Pollock, C. B., Alderson, Platt, and Martin, BB., — was now delivered by

POLLOCK, C. B. — In this case a verdict has been returned for the plaintiff, with leave to the defendant to move to enter a verdict on the second and third issues. We think

that the rule ought to be made absolute to enter the verdict on those issues, giving liberty to the plaintiff, if he thinks fit, to give up the other issues in which a verdict has been found in his favor, and be nonsuited. Whether that will be of service on another occasion, the plaintiff will be advised. We hold out no expectation that it will be of any benefit.

The ground of the conclusion to which we have come is, that in our judgment, in point of law, if a plaintiff sues on a bill of exchange in which he has no interest, and of which he has no possession, he is not the right person to sue, and not in condition to maintain an action. The pleas in this case, that this bill was not indorsed to the plaintiff, and that he was not the holder at the time of action brought, were, we think, made out in point of fact at the trial. In support of the above view, it is unnecessary to do more than refer to the cases of *Gill* v. *Lord Chesterfield* (which has not been reported), and *Sainsbury* v. *Parkinson*, which was tried before me, and is reported in the Law Times of January, 1852, which establish the proposition on which in our opinion the present case turns.

It was however argued that the plaintiff, though certainly he had no actual possession of this bill by himself, had some constructive possession of it by his agent. But we think that Rickards was not his agent, neither was Dr. Walker his agent, and it would really be confounding things which are quite different, if we were to hold that there was any evidence that the latter was his agent. The truth is, that Dr. Walker was not his agent: in fact, the plaintiff was the agent of him and of Rickards, and there is no reason why we should refine and make nice distinctions, in order to give effect to a transaction obviously adopted for some reason which is not very apparent — probably either to keep some matter out of the view of the jury, or some person in the background who did not wish to be forthcoming. It is better to adhere to the plain results of matters of fact which come before us. We think there was no evidence of any possession of any sort in the plaintiff, and therefore that he was not the man entitled to sue. The rule must therefore be made absolute, subject to the alternative I have stated.

M. Chambers then applied to the court to permit the plaintiff to tender a bill of exceptions.

Pollock, C. B. — We have considered that also: and

think your case so desperate that we ought not to put the opposite party to expense by giving you any facility of the kind. You have all the opportunity you want of raising the question again, if you will consent to be nonsuited and bring a fresh action.

M. Chambers. — The decisions hitherto have proceeded on an opposite principle from that now laid down by the court.

Pollock, C. B. — No doubt there has been much laxity about the law of bills of exchange; and it has been thought that any one might without title or possession bring actions upon them. I much doubt if you were to ask any jury whether, according to the custom of merchants, a person in the position of this plaintiff is the right person to sue on a bill, they would say "No."

Alderson, B. — It is a bad thing to get rid of the simplicity of the law. The person who holds, should hold. — *Rule absolute accordingly.*

Court of Common Pleas, June 3, 1853.

Mountague *v.* Perkins, p. 557.

Bill of Exchange — Blank Acceptance — Indorsee and Acceptor — Reasonable Time — Statute of Limitations.

A person, by giving another a blank acceptance, makes him, as to third parties, his general agent to fill up the bill to the extent the stamp will cover, and he is bound by his acceptance in the hands of an innocent holder for value: therefore, to an action by an indorsee for value without notice against the acceptor, it is no defence that the acceptance was given in blank to the drawer, and that the bill was not filled up and issued until an unreasonable time (twelve years) after.

The statute of limitations runs from the time the bill became due as filled up, and not from the time it would have become due if completed when it was accepted in blank.

Declaration on a bill of exchange drawn by Henry Swinburn, on the 1st September, 1852, on the defendant, for 200*l.*, five months after date, accepted by the defendant, indorsed by Swinburn to J. Huskisson, and by Huskisson to the plaintiff. Pleas — first, traversing the acceptance as alleged; secondly, that the cause of action did not arise within six years. At the trial, before Jervis, C. J., at the sittings in London after Easter Term, the bill declared on was produced, and was on a 5*s.* stamp, of the date of March

6, 1835, and the acceptance was proved to be in the defendant's writing. On the part of the defendant it was proved that previous, and up to the year 1840, he had occasionally accepted bills for Swinburn, and had given him blank acceptances to take up those bills, but that he had never written any blank acceptance since 1840, and had never heard of the present bill till October, 1852. The body of the bill was proved to be Swinburn's writing. The jury found that the bill was given in blank in 1840, and was not filled up till 1852; and in answer to a question put to them by Jervis, C. J., on the authority of *Mulhall* v. *Neville*, (20 Law T. 113,) said that it was not filled up within a reasonable time. A verdict was entered for the defendant on both issues, with leave to the plaintiff to move to enter it for him for the amount of the bill.

Byles, Serjt., having obtained a rule accordingly,

Channell, Serjt., and *Archibald* (June 3), showed cause. The defence disclosed under the traverse of the acceptance entitles the defendant to retain the verdict entered for him on that issue. It is not denied that putting one's name to a bill stamp gives authority to the person to whom it is delivered to fill up the bill to the amount the stamp will admit of. *Collis* v. *Emett*, (1 H. Bl. 313.) But the mere writing the name does not constitute a bill of exchange in itself — it is only evidence of an authority to fill up the blank paper to the amount limited by the stamp, within a reasonable time. *Awde* v. *Dixon*, (6 Exch. 869.) Alderson, B. there says, (p. 871,) "A blank acceptance is not of itself authority to make a complete bill, but only evidence of authority," citing *Molloy* v. *Delves*, (7 Bing. 428); and Parke, B., speaking of *Collis* v. *Emett*, says, in that case there was an unlimited power to draw in any way. [*Cresswell*, J. — In *Awde* v. *Dixon* the note was not to be filled up unless another person also put his name; and it was therefore filled up against the express authority of the defendant. *Maule*, J., cited *Schultz* v. *Astley*, (2 Bing. N. C. 544.)] Now, although the authority here was unlimited as to the amount, except by the stamp, yet it was only an authority to fill up within a reasonable time; and the jury have found the time unreasonable. *Roberts* v. *Bethell*, (22 L. J., C. P., 69,) shows that an acceptance must be taken *primâ facie* to have been made within a reasonable time of the drawing; and the same principle applies here: *Mulhall* v. *Neville*, (20 Law T. 113); *Tem-*

ple v. *Pullen*, (22 L. J., Ex., 152), where it was held that the question of reasonable time is for the jury. [MAULE, J. referred to *Mellish* v. *Rawdon*, (2 Moo. & Sc. 570)]. [They also contended that the statute of limitations ran from the date at which the blank acceptance was given.]

Byles, Serjt., and *Fortescue*, in support of the rule.

A blank acceptance is a letter of credit for an indefinite sum, up to the amount the stamp will cover: *Russel* v. *Langstaffe*, (2 Dougl. 513,) where Lord Mansfield says, "An indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Galley (the drawer) to any amount, and I will be his security.' It does not lie in his mouth to say the indorsements were not regular." So, Lord Ellenborough in *Cruchley* v. *Clarance*, (3 Mau. & S. 29) — "As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant, by leaving the blank for the payee's name, undertook to be answerable for it when filled up in the shape of a bill." And Bayley, J. says, "The issuing the bill in blank, without the name of the payee, was an authority to a *bonâ fide* holder to insert his name." *Attwood* v. *Griffin*, (Ry. & M. 425,) is to the same effect. In *Rex* v. *Revett*, (Byles on Bills, 103,) A. by false representations induced B. to sign his name to a blank stamped paper, which A. afterwards secretly filled up as a promissory note for 110*l.*, and induced C. to advance him 100*l.* upon it. A. was indicted for defrauding C.; and it was held that C. had his remedy against B. on the note, and that the fraud, therefore, not being on C., but on B., the indictment was not sustained by the evidence. *Temple* v. *Pullen* and *Mulhall* v. *Neville*, are no authorities against the plaintiff's right to have the verdict entered for him on the first plea. As to the Statute of Limitations, — [JERVIS, C. J. — The Court has no doubt on that point.]

JERVIS, C. J. — I think I was wrong at the trial, and that I ought to have directed a verdict to be entered for the plaintiff, notwithstanding the jury said, and that rightly, that the blank bill had not been filled up within a reasonable time. It was admitted in the course of the argument by my brother Channell, that the giving of a blank acceptance was evidence of the creation of an authority to fill up the bill to any amount, and to any extent in time which the value of the stamp admits of; but he contended that

it is a good defence to show that this authority had been carried out an unreasonable time after its creation. But I think that this is not the case with reference to the acceptor and a *bonâ fide* holder for value. How does this differ from the rule ordinarily applicable to the case of principal and agent? A person, by handing over to another his blank acceptance, gives him the opportunity of filling it up to the amount and date limited by the stamp. As between the parties themselves, there may be secret stipulations limiting the time and object for doing this, but these do not hold good as between the world in general and the principal, the person so giving authority to the other — the public are not bound by them. How does it, in fact, differ from the case where an agent is employed by his principal to sell cotton at Liverpool or elsewhere, with certain stipulations as to the price and conditions under which he is to sell? By employing him as his agent, he accredits him as his agent with general authority, and holds him out as such to the public; and if the agent sells contrary to the stipulations, still the principal is bound. An agent who does not disclose his limited authority, is taken to act on a general authority. The authority enables the agent to contract with third parties, and as the limitation does not accompany the authority, they are not bound by such limitation. As the principal has put it in the power of the agent to act as such, he is bound by the act of the agent; and that is the effect of the decision in the case of *Russel* v. *Langstaffe*, which is not touched by the late cases in the Court of Exchequer. The rule must therefore be absolute to enter the verdict for the plaintiff.

Maule, J. — I am of the same opinion. The defendant, by writing his name on the blank bill stamp, and issuing his blank acceptance, must be taken to have known that he put it in the power of any person who got hold of the paper to make him appear to the public as the acceptor to any amount of which the stamp admitted. He must be considered as having intended the natural consequences of his own act, viz. that the person into whose possession he gave this paper might represent him to third parties as having duly accepted the bill. The plaintiff here was a *bonâ fide* holder for value; and to hold that the defendant was not bound as against him would cause great mischief to ensue; for to hold thus would be to relieve an incautious person, who had acted recklessly, at the expense of

an innocent and cautious person, and thus put it in the power of the former to impose upon the latter. We can decide, as we do, in the plaintiff's favor, without conflicting with any previous decision, and in affirmance of a principle of mercantile law, which is to favor the negotiability of written instruments, and to give protection to *bonâ fide* holders of such instruments.

Cresswell, J. — I am of the same opinion. The defendant, by putting Swinburn in possession of the blank acceptance, put it in his power to fill it up as he chooses, and present it to the world as so accepted. The rule must be the same here as in the common case of an agent for sale with special and limited authority, who is taken to be an agent with general authority, as far as third parties without notice are concerned.

Talfourd, J., concurred. — *Rule absolute.*

Court of Admiralty.

The Montreal, p. 538.

Collision — Both Vessels in Fault — Pilot in Charge of one under Local Act — Costs.

In a collision, where the court, assisted by the Trinity Masters, decided that both vessels were to blame, but that with respect to one of them the blame was to be attributed to the pilot, who had been taken on board under a local (Liverpool) pilot act: *Held*, that such vessel was not to contribute to the loss; and with respect to costs, that each party must pay his own costs.

Dr. Lushington. — In this case it has been determined by the court, in concurrence with the Trinity Masters, that both vessels were to blame for the collision that occurred. According to the ordinary course of proceeding, the damage and costs would, therefore, be paid in moieties by both parties. The collision took place in the river Mersey. Assuming *The Montreal* to blame, the owners have alleged, that whilst the vessel was off point Lynas she took on board a duly licensed pilot of the port of Liverpool; that at the time of the collision, the pilot had entire charge of the vessel, and all his orders were obeyed; and the Trinity Masters have found (and the court agrees with the finding,) that the blame attaching to *The Montreal* is exclusively the fault of the pilot, and not of the master and crew. The question therefore is, whether under the Liver-

pool pilot act,[1] (for I do not mean to advert to the general pilot act,) the owners of *The Montreal* are released from the responsibility of contributing to the damage that occurred. Now, this question, in my opinion, turns upon the point, whether, under the Liverpool pilot act, it was compulsory upon the owners to take a pilot or not. If compulsory, the owners are relieved from all responsibility; if the taking the pilot was voluntary, then the responsibility would remain. It is clear from that act of Parliament that this vessel was bound to take a pilot for the purpose of

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[1] Liverpool Pilot Act, 5 Geo. IV., c. 73. — Sect. 25. "And be it further enacted, That in case the master or commander of any ship or vessel inward bound shall refuse to take on board and employ a pilot, so to be licensed as aforesaid, who shall offer his services, (except such as shall be in ballast in the coasting trade, or be under the burthen of 100 tons), such master or commander shall pay or cause to be paid to the pilot who first, or who only, shall offer his services as aforesaid, and shall be so refused, the pilotage, according to the different rates and prices hereinbefore directed to be paid, as if the said pilot had been received and employed in conducting or piloting such ship or vessel into the said port of Liverpool."

Sect. 32. "And be it further enacted, That every pilot, to be licensed as aforesaid, who shall pilot or conduct any ship or vessel into the said port of Liverpool, is hereby required to take care, (if need be) to cause such ship or vessel to be properly moored at anchor in the river Mersey, and afterwards to conduct such ship or vessel into one of the wet docks within the said port, without being paid any other rate or price than is hereby directed to be paid for the piloting or conducting such ship or vessel into the said port of Liverpool; but in case such attendance shall be required during such ship or vessel being at anchor in the river Mersey, and before she is docked, 5*s*. per day shall be paid: provided always, that this act shall not extend to prevent or hinder the master, or other person having the command of any ship or vessel in the coasting trade being in ballast, or any ship or vessel in the coasting trade being under the burthen of 100 tons, by the certificate of registry, from conducting or piloting his said ship or vessel into or out of the said port of Liverpool, nor to hinder any person or persons from assisting any ship or vessel in distress, nor to subject any such person or persons to any of the penalties of this act; any thing herein contained to the contrary thereof in anywise notwithstanding."

Sect. 34. "And be it further enacted, That if the owner, master, or commander of any ship or vessel shall require the attendance of a pilot, licensed as aforesaid, on board any ship or vessel during her riding at anchor, or being at Hoylake or in the river Mersey, such pilot shall attend such ship or vessel, and be paid, for every day he shall attend, 5*s*., and no more: provided always, that in case such pilot shall not be employed the whole day, but be dismissed in less than a day, such pilot shall be paid 5*s*. for his attendance: provided also, that the pilots, so to be licensed as aforesaid, who shall have the charge of any ship or vessel, shall be paid for every day of their attendance whilst in the river, except the day of going to sea with such ships or vessels as shall be outward bound, and the day of returning from sea and the day of docking for such as shall be inward bound."

entering the port of Liverpool; but it is contended that she was not bound to have a pilot at the time of the collision by any of the provisions of that act. The pilot was taken on board on the 25th November to pilot the vessel to the Queen's docks at Liverpool: the ship arrived in the river Mersey on the 26th November, and anchored off the Albert dock wall between 11 and 12, A. M., it being too late to enter the Queen's dock with that tide. She remained at anchor till the flood-tide had made, when, having a steam-tug to assist, she proceeded at about 11 o'clock up the river, and in so proceeding the collision occurred. Now, it is alleged that the compulsory employment of the pilot ended when the ship anchored off Albert dock wall. I have carefully referred to all the enactments bearing upon this question in the Liverpool pilot act, especially to the 32d section, and I am clearly of opinion that the fact of the vessel anchoring off the Albert dock wall — a necessary measure before she could be conveyed into the Queen's dock — was no interruption of the original agreement, and in no degree rendered the employment of the pilot from the Albert dock wall to the Queen's dock a voluntary measure: it was one continued service, which the pilot was bound to perform, and for which the master was bound to take a pilot; and it would be almost absurd to hold, looking at the terms of the act of Parliament, that that service ended upon the mere entrance into the port of Liverpool, and before the vessel was docked. I am, therefore, of opinion, that at the time of the collision the pilot was compulsorily employed; that the whole blame, as related to *The Montreal*, was his; that *The Montreal* is not liable to contribute to the damage occasioned thereby; and that each party must pay his own costs.

Abstracts of Recent American Decisions.

Supreme Judicial Court of Massachusetts, March Term, 1853.

Appeal. See *Justice of the Peace.*

Attachment — Trespass. Trespass *quare clausum*, with the aggravation of taking and keeping possession of the plaintiff's store of goods. A writ *B. et al.* v. *C.* was placed in the hands of the defendant, the United States' marshal, who thereupon entered plaintiff's store and attached his goods as *C.*'s property, and left a keeper. Soon after, the attorney of *B. et al.* having ascertained that said store and goods belonged to *G.* and

not to C., took the writ from the defendant, altered it by inserting G.'s name as joint defendant with C., and then restored the writ to the marshal, who went to the store, stated that he gave up his former attachment, and again attached the goods as the property of G , gave the keeper, who had kept possession of the goods all the while, a new deputation to hold said goods as the property of G., neither the marshal nor keeper having left the store; and thereupon defendant held the store and property about two days, and returned an attachment as of the plaintiff's property, saying nothing about the former attachment. The jury found a verdict for the plaintiff for $175, and by agreement stated the damages for the time the property was held prior to the second attachment to be $75. *Held*, that the alteration of the writ did not affect the officer's liability, although it might be otherwise as to the attaching plaintiff or his attorney — that the second attachment of the goods as G 's property was not invalid, as it was not the object intended to be accomplished by means of the original trespass (as in *Ilsley* v. *Nichols*, 12 Pick.); and judgment was rendered for the less sum, $75. — *John C. Gile* v. *Chas. Devens.*

Audita Querela — Insolvent Laws. March 15, 1850, defendant sued a firm of which F. was a member in the Court of Common Pleas in Suffolk county No appearance was made by any of the defendants, and no suggestion on the record. March 16, F. applied for the benefit of the insolvent law in Norfolk county. The defendant proved the note sued on which was allowed, but on the day of the third meeting, June 11, was withdrawn from the commissioner by defendant's counsel without F.'s knowledge, and judgment was entered on it in the Court of Common Pleas as of June 10; June 13 an execution thereon was taken out; then an *alias* and afterwards a *pluries*, on which, Nov. 5, F. was committed. F. was discharged in insolvency, October 10, but said discharge was never presented to the Court of Common Pleas, nor suggested on the record during the pendency of the action nor before F.'s commitment. *Held*, that in *audita querela* "allegations of abuse are not to be heard as a ground of complaint where the party complaining has already had a legal opportunity for defence;" that it is a remedy for a defendant where matter of defence has arisen since judgment, but here was no such matter; that perhaps the other members of the firm might have *audita querela* if there was a dividend, and the present defendants should go against them for the whole debt. — *John G. Faxon* v. *Benjamin D. Baxter.*

Bailment — Banks — Promissory Note Action on the case for defendants' negligence in not duly demanding of the maker payment of a note left with them by the plaintiffs for collection. It is and has been for many years the usual course of business of banks in Boston and of the defendants, and of the defendants in their dealing with the plaintiffs, to place notes left with them for collection at the close of banking hours on the day of payment, if unpaid, in the hands of a notary public for demand and protest. That course was here pursued, and all the alleged negligence was on the part of the notary. *Held*, that the collecting bank was not responsible beyond the selection of some suitable person (whether holding an official character or not) according to the ordinary course of their own business known and recognised by the other party. — *Warren Bank* v. *Suffolk Bank.*

Contract. See *Duress and Insolvent Laws.* Action on a promissory note for $105.37. Defendant relied on the following receipt: "Received of W. B. K. his note for $105.37 in full for execution of *R. F.* v. *T. L. et al.* issued June 20, 1843, given to P. which I will return to the said K., namely, the execution. S. and W. by W. S."; and contended that the note was on condition that the execution should be returned, and was without

consideration. Said execution was founded on a note given by said *T. L. et al.* to said S. and W., which was indorsed and turned out as collateral to F and W. for a debt due them, the proceeds to be accounted for when received. F. and W. sued the note in their own name; not collecting any thing, they returned it to S and W., who paid their debt. F. and W. always considered said note and execution the property of S. and W. unless collected, and had never given credit for either. *Held*, that the note and the undertaking to deliver up the execution were independent contracts, and that a failure to return the execution, if proved, would be no defence to the note. — *Ezekiel Waterhouse* v. *Wm. B. Kendall.*

Corporation — Partnership. Assumpsit on a promissory note by J. M. B. as treasurer of the O. Copper Co against certain individuals as partners. Said company was chartered by the Massachusetts legislature to manufacture copper in Salem. None was ever manufactured there, and this note was given for supplies furnished to carry on the mining of copper in Michigan, and it was contended that they were never legally incorporated, or if so, that this was not a debt of the corporation. But it was *held*, that this action could not be maintained, and that, no certificate having been filed and recorded, under R. S. c. 38, § 16, to make the defendants liable under that chapter, judgment must first be obtained against the Corporation. — *Trowbridge* v. *Scudder et al.*

Delivery — Fraud — Evidence. Replevin and trespass for flour attached as the property of one H. H. obtained the plaintiff's note for $650, for which he promised to sell and send to him two hundred barrels of flour; went to Albany, bought flour, and sent the following order in a letter to the plaintiff.

"Albany, Nov. 20, 1850.

B. & W. R. R. Co., — Please deliver to W. Hatch, 2d
100 barrels White Mills Flour,
23 " Akron " "

J. B. H."

On the —— day of November, H. put on the Western Railway at Albany for transportation to Boston, 100 bbls. "White Mills," and 23 "Akron" flour, to be delivered to himself at Boston, and it was so stated on the way-bills. Said 100 bbls. were attached at Worcester, Nov. 23, in a car belonging to the Worcester Railroad, said 123 bbls. being then on the track of the Western Railroad at that place. The 23 bbls. reached Boston Sunday morning, Nov. 24. Nov. 22 the plaintiff presented said order to the assistant flour clerk of the Worcester Railroad, and paid to one of the clerks the freight on the 123 bbls. He directed said flour clerk when he presented the order to have the flour "notched," that is, run upon a branch track behind the plaintiff's store, where it could be unloaded directly into the store, and where by virtue of an agreement by the railroad corporation he had a right to have it delivered. He repeated his direction Nov. 23. On the evening of the 25th he came again to the depot and repeated his directions that the flour should be notched, and before going to breakfast next day said clerk marked the car containing the 23 bbls in chalk — "W. Hatch, 23 barrels notched." Said car also contained other merchandise. Subsequently on the same day, and while said car was standing with other cars on the main track of the Boston and Worcester Railroad, in the depot, the 23 bbls. were attached; the car not having been opened before the attachment. It was the duty of the railroad company to run the car upon the side-track, to open it and deliver the goods. This car belonged to the Western Railroad Co. with which the contract for the transportation of the flour was made, and between which and the Worcester Railroad there was an arrangement by

which the latter took charge of all freight that came over the former to Boston, and collected the freight; and the cars of both were used promiscuously. *Held*, (as to the 23 bbls in *H.* v. *B.*) that there was a sufficient delivery to pass the property in the flour to the plaintiff; that it was not necessary the flour should be separated from other merchandise transported with it; that the right to receive the flour being assignable, and H. having ordered a delivery to the plaintiff, to which the company assented, and directed such a delivery in the manner stated, there was a good constructive delivery; and it having been contended that the sale was fraudulent, it was *held* not erroneous to instruct the jury that the presumption being that every man conducted honestly, more evidence was necessary to establish a fraudulent than an innocent sale. And in *H.* v. *L.*, *held*, that there was a distinct and collateral contract which might be proved by parol, to send flour to pay for the note; and when bought and delivered there was an executed sale agreeable to the contract; that any evidence showing a delivery to the carriers, and their agreement to hold for the plaintiff, was sufficient to prove a delivery; and when H. sent an order to the plaintiff, who gave notice to the company, and they by their agent assented, and took his direction as to the place of delivery, it being an executed sale, the property vested in the plaintiff, and the contract was consummated by delivery, the carriers becoming the plaintiff's agents, and they were those of H. — *Winsor Hatch* v. *B. F. Bayley; Same* v. *J. W. Lincoln.*

Delivery — Trover. Trover for flour consigned by the plaintiff to G. and by him pledged to the defendants. D purchased the flour, drew drafts on G, stated therein to be "drawn against the flour described in the warehouse receipt, hereto annexed corresponding to this draft." The warehouse receipt acknowledged the receipt of a certain number of barrels of flour marked and numbered as described, which he agrees "to hold, insurance perils excepted, subject to the sole order of G or his assigns, and by first opportunity to ship the same consigned to G. or his assigns; storage at Detroit to be paid by owner, with condition that this receipt remains attached to the following certificate referring to the property herein described" "I hereby certify that I have drawn my draft, &c. &c. (describing it) against the property described in the receipt herewith numbered 12 by D. This receipt and certificate shall remain attached to said draft, and shall be evidence of a lien on the said property in favor of the holders of said draft until payment, but reserving to the consignee named in this receipt and certificate the right to sell the same upon receipt, holding the proceeds instead of said property in trust for the holder of said draft." G. accepted the drafts; they were not paid, and he received and pledged the flour. *Held*, that by accepting the drafts with this paper attached, G. bound himself to appropriate the property as a security for the money advanced on the drafts, and when the arrangement above described for pledging the flour to secure the drafts was notified to G and assented to by him, that changed the property, if it were not already changed; G. became the agent to receive, hold, appropriate and account for the flour to the holders of the drafts from that time, and they became the owners, and that D. had so far lost the right of property in the flour that he could not maintain trover nor recover it, it being immaterial, as to that point, whether the ownership of the pledgees was absolute or qualified. — *Fitz H. DeWolf* v *J. D Gardner et al.*

Devise — Trustee, Appointment of by Judge of Probate. Appeal from decree of Judge of Probate, dismissing petition of the children of B P. H. that a trustee might be appointed under his will of property devised for their benefit in trust to F. H. H. and N. P. R. "their heirs and assigns as

joint tenants and not as tenants in common," N. P. R. having deceased. *Held*, that the devise to trustees and their survivor was not a provision for supplying a vacancy in trustees under Rev. Stat. c. 69, § 8, and that the *cestuis que trust* were entitled to have a new trustee appointed. — *Mary B. Dixon et al.* v *Fitz Henry Homer.*

Duress — Contract — Surety. Assumpsit on a promissory note. Defence, duress, by threats of an unlawful arrest of one G. for a note, as collateral for which, and to suspend its collection, this was given. *Held*, that duress *per minas* might avoid a contract, although of other things than death, mayhem, or loss of limb, (2 Greenl Ev. § 301); but such duress, to avoid the contract, must be upon the party pleading it; that although it was very doubtful whether the contract would be binding on the defendant without an independent consideration, as between him and the plaintiff if avoided by duress as to the principal, yet here there was such a consideration in the agreement to forbear and actual forbearance. — *Margaret Robinson* v. *Daniel Gould.*

Evidence and Fraud. See *Delivery.*

Insolvent Laws — Foreign Attachment. *Scire facias* against an alleged trustee. The trustee was the assignee under an assignment by H. & B., insolvent debtors, of their partnership property, in trust for their creditors, to which the plaintiff did not become a party, but to which creditors to a greater amount than the value of the property assigned were parties. *Held*, that the assignment was void as against him, because it conflicted with the insolvent laws; and the following particulars were specified in which it so conflicted. The assignment did not include the separate property of the assignors; and as to this it was held not necessary to show that there was any separate property. It authorized the assignee to pay off liens, and therefore did not avoid attachments. It made no provision for defeating previous preferences. It took away from the creditors the appointment of assignees, and substituted a person not under the same responsibilities. If valid, and passing the property assigned, it defeated the creditor's right to proceed under Stat. 1838, c. 163, § 19. It defeated his right to an examination of the debtor under oath and to a full disclosure of his property, although containing a covenant to disclose property, as that was merely an executory undertaking. It took away the superintending power of the officers designated by law to see to a disclosure, and to an honest administration and an equal distribution of the debtor's effects, and was inconsistent with a full disclosure and surrender, and it was no answer that it provided for a distribution according to the terms of the insolvent laws; that applied only to parties. And the trustee was charged. Hence it would seem that no assignment in trust for creditors can be valid under our insolvent laws. — *Wm. H. Wyles* v. *Wm. Beals, Jr.*

Insolvent Laws. Assumpsit on three bills of exchange drawn in Pennsylvania, the drawer being then a citizen of that State, the payees of New York, the acceptors (defendants) of Massachusetts, and the plaintiffs (indorsers) of Pennsylvania. Defence, a discharge in insolvency in this State. The bills were proved (with others) before the Master in Chancery by the payees, who afterwards petitioned for leave to withdraw these as proved by accident, which was allowed. *Held*, that the Master had authority to allow the withdrawal; if improperly done, the remedy was by appeal, or other proceedings, to bring the case before this court; and that being proved by mistake, and withdrawn by leave, it was no submission to the jurisdiction. — *E. Safford* v. *Calvin Slade et al.*

Insolvent Laws — Practice — Contract. See *Audita Querela.* Action on a note in favor of creditors residing in New York. Defence, that after it was over-due, being then the property of the plaintiffs, the

defendant applied for the benefit of the insolvent laws; that he then owed them another debt, and they agreed if he would obtain payment of the latter they would prove the note in insolvency; that he caused said debt to be paid, and afterwards obtained his discharge, and the plaintiffs did not prove the note. *Held*, that these facts afforded no defence; the contract being tainted with illegality, and contrary to the policy of the insolvent laws. And the discharge being offered to limit the execution to the defendant's goods and estate, and its validity denied; *held*, that this raised an issue to be tried by the jury, not the court. — *Downs* v. *Lewis*.

Joinder of Parties — Pleading — Slander. Joint action by husband and wife for slander, in words alleged to have been spoken of them together, *e. g.* among others, "They are bad characters," &c. *Held*, that to maintain a joint action, there must be a joint injury, and that the plaintiffs could not join for this slander. — *Titus F. Gaszynski et ux.* v. *H. Colburn*.

Justice of the Peace — Appeal. An appeal lies from a judgment of nonsuit by a justice of the peace. — *Stephen Ball, appellant*, v. *P. B. Burke*.

Partnership. See *Corporation — Promissory Note.*

Pleading. See *Joinder, &c.*

Practice. See *Insolvent Laws.*

Promissory Note — Partnership — Payment. See *Bailment.* This was an action for an instalment on a promissory note signed by the defendant W., payable to the order of G. R., and indorsed to the plaintiff. Defence, that it was indorsed over-due, and a set-off, which was a note signed by G. R. in the name of the firm of R. & P., which was dissolved after giving said note, and that of P. & W. formed of said P. and the defendant. This note was first purchased of the payee (when over-due) by the firm of P. & W., and afterwards (before said instalment fell due) transferred by them to the defendant. *Held*, that such purchase by P. & W. was not a payment of the note so as to discharge R. — *R. J. Fulton* v. *Wright W. Williams*.

Payment, appropriation of to an Illegal Demand. See *Promissory Note.* Replevin for property attached in a suit against A. B., which the plaintiff claimed by virtue of a mortgage to secure a note dated June 7, 1849, payable in thirty days, for $200. The plaintiff made a demand on the attaching officer under said mortgage, claiming as due thereon the amount of the note. Defendant offered evidence of the payment of $216 on said note between its date and March 7, 1850, in monthly payments of $24 each; and the plaintiff offered evidence that it was paid on a parol agreement by A. B. to pay $24 per month for the use of the $200. *Held*, that a creditor cannot himself appropriate a general payment to an illegal demand — that where there is any thing to satisfy the jury that there was an appropriation of a payment to which the debtor consented, although to such a demand, it must be carried out; but that when no appropriation is made by him or with his consent, it is not competent for the creditor alone, having two demands, one illegal, to appropriate it to that. — *Edward Rohan* v. *M. P. Hanson*.

Slander. See *Joinder, &c.*

Statute of Frauds. Assumpsit for a pew in Boston sold at auction. A book was offered containing the following entry:

"Sale of pew in B. St. Ch. for account S. F., Monday, March 24, '45.

Pew No. 18, B. M. . . .	$112.50
Charges, advertising and commission, .	5.00"

Held, that if this entry was made by the auctioneer, or by his clerk under his direction, at the time and place of sale, it was enough to take the

case out of the statute of frauds. The entry designated what was sold, by and to whom, the time and price; for although the defendant's middle name was omitted, it was competent to show that he was known by the name used, or that he subsequently recognised it as his; and as to the terms of sale, the presumption is that it was for cash. — *Selinda Fessenden, Adm'x*, v. *B. B. Mussey.*

Surety. See *Duress.*

Trespass. See *Attachment.*

Trover. See *Delivery.*

Trustee. See *Devise.*

Miscellaneous Intelligence.

YOUNG LAWYERS IN ENGLAND. — It is a little surprising, and not very refreshing, to see how continuous is the stream of aspirants for the degree of barrister, notwithstanding the great decrease for the last few years of the business of the bar, and the great and apparent probability that the amount of its business will not for many years more, if ever, be restored to its former state. During this term no less than twenty-two men were called to the bar at the Inner Temple, and a considerable number at the Middle Temple and Lincoln's Inn; altogether the number called has not much fallen short of the palmy days of the bar, when not only the Courts of Common-law were full, and Chancery business heavy, but in Parliament the atmosphere of the committee-rooms was surcharged with briefs, and bags could scarcely be large enough to hold the papers clamoring to be thrust into them. All this has long ceased; pleaders are destroyed; as the military phrase runs, the regiment has been literally "cut to pieces." At the bar, both at Common-law and in Chancery, business has totally changed its character. The class of business that required what used to be called a "safe man" is nearly gone. Forms are so much given up, we do not say at all unwisely, but still in fact they are so much given up, and when still required, the cure of a defect in the framing or conduct of a suit is so comparatively easy and inexpensive, that there is nothing left to be safe about. Then, as to the class of business that required little more than the name or appearance of counsel; motions of course of every kind; applications, which, if not absolutely of course, could rarely be practically the subject of opposition; and, in fact, almost every kind of light business has nearly disappeared from Chancery; and at law, we believe, it is wholly extinguished. The business of the draftsman in Chancery is diminished, at the most moderate calculation, one half. Bills are not half the length they used to be; answers are rare, and when put in at all, are neither long nor intricate; exceptions are things talked of as known to our predecessors. Numberless matters, which in Chancery used to require the advice and drawing of counsel out of court, and their presence in court, are now done in the judges' chambers. In fact, the style of business has altogether changed, and we hesitate not to say that the quantity of work to be done by counsel is diminished by at least one half. We say expressly the work to be done by counsel, because, under the present system, all the business appropriated to counsel must be done by counsel personally. There was, in the old style of business, both at law and in equity, much of a barrister's business which could be and was done by his pupils or by his clerk. There was unquestionably a great

deal of routine rubbish which required the penman's finger, not the lawyer's head. There is, happily for the public, none such now. We know scarcely any thing now which comes into a barrister's chambers, in doing which any body can materially assist him; and so far from its being likely that the old state of things will return, the tendency of the age is directly the other way; to simplify and shorten more and more — to expunge from legal procedure every thing that is merely technical and subtle — to dispense with every step in a cause which can with any degree of safety be dispensed with — to compel brevity in all written statements — to bring, in fact, the preparation and conduct of a cause, as far as is practicable, to the presentation and discussion of the substantial questions of law and fact, and nothing else.

Now, that these reforms of the law will greatly raise the *status* of the bar, we have no manner of doubt; but, on the other hand, neither have we any manner of doubt that a bar of half the present number will, in a very few years, be sufficient to transact all the business of the country.

Is it, then, a time for young men to be flocking to the bar, as if the days had returned, or were ever to return, when hundreds could reap considerable incomes by the transaction of purely formal business? We conceive not. Henceforth it should be well understood, by young men who have any inclination to choose the bar as a profession, that there will be very little demand at the bar except for thorough men of business. A fair amount of legal learning, a great amount of clear strong common sense, considerable powers of speaking, quickness, readiness, and energy — these, and these alone, will be the qualities that will enable counsel to transact business from this time forward for many long years. There is very little common business now; there will be none in a few years; it will all be special, and not easy. The change is, in fact, this — formerly the character of the business was such that there was much to do for several classes of men; now and henceforward the circle within which can be found the requisite qualification is very much contracted. The business to be done is less, and will, at least for many years, be less in quantity, but of more difficult execution; consequently, if one may, without affront to the bar, use a manufacturing expression, fewer and better hands will be wanted.

Again, therefore, we say, this is a time when the prospects of the bar are not such as to afford any justification for the abundant supply which seems to be pouring into its ranks, or any ground for hope that one half of those who are coming in will ever find any thing to do. — *Jurist.*

The Mississippi Union Bank Bonds. — The important suit of *The State of Mississippi, appellant*, v. *Hezron A. Johnson, appellee*, to which we have heretofore referred, has been at length decided against the State. The suit was instituted upon one of the bonds of the Missis-ippi Union Bank, in order to determine legally the liability of the State for the $5,000,000 of bonds which were issued on account of said bank. The bank was chartered on the 5th February, 1838, with a capital of $15,500,000, and the credit of the State was pledged "for the security of both the capital and interest, and that 7500 bonds, each for $2000," bearing interest at five per cent. per annum, and payable at different periods, should be authorized to be "signed by the Governor of the State to the order of the Mississippi Union Bank, countersigned by the State Treasurer, and under the seal of the State." By a supplemental act, approved 15th February, 1838, the governor was authorized, as soon as the subscription books were opened, "to subscribe in behalf of the State for 50,000 shares

of the original capital stock of the bank, the same to be paid for out of the proceeds of the State bonds" before described. It was also provided that the dividends and profits on said stock should be held by the bank, subject to the control of the State Legislature, for the purposes of internal improvement and for the promotion of education. Upon the opening of the books the governor subscribed for five millions of the stock, and on the 5th June, 1838, issued with the others, the bond in suit, which was duly signed and countersigned and under the seal of the State. It was made payable to the order of the President, Directors and Company of the Mississippi Union Bank, and was by them transferred by indorsement to the complainant. The sale of this bond, and the others was made for $5,000,000, and the money therefor duly received by the bank.

The suit was a bill in equity filed in the Superior Court of Chancery against the State of Mississippi by the appellee under the provisions of the statute enacted in compliance with the 10th section of the 7th article of the Constitution, directing the method and designating the court in which suits against the State should be brought. The general defence was set up in the answer, that the bond was invalid, it being made, delivered and sold without authority and in violation of law. On the 21st February, 1853, it was decided by the Chancellor of the Superior Court, that the State was legally liable on the bond, and a decree was rendered for the amount thereof and interest.

From this decree the State's Attorney appealed to the High Court of Errors and Appe ls, where the cause was argued orally on the 16th, 17th and 18th days of May, 1853, by D. C Glenn, attorney-general, on the part of the State, and D. W. Adams, Esq., for the appellee. The cause was finally decided on the 30th July, 1853, by a unanimous opinion and decision of the court, affirming the decree of the chancellor, and holding the State liable for the payment of the bonds.

The Right of Municipal Corporations to Subscribe for and Purchase Stock in Railroads, &c. — The Supreme Court of Pennsylvania in the case of *William P. Sharpless et al.* v. *The City of Philadelphia*, which was an application for an injunction, has decided that municipal corporations, when authorized by the legislature, may subscribe for and purchase stock in railroads, may borrow money therefor, and may make provision for the payment thereof as in cases of other loans to the city. Two of the judges, however, JJ. Ellis and Lowrie, dissented. The reliance of the applicants for the injunction was in a great measure based upon the fact, that the subscription in question was to be made to the stock of railroads which were not within, and could never touch the corporate limits of the city of Philadelphia; one of the roads — the Easton — being confined by its charter to a point on the north side of Vine Street, in the county of Philadelphia, and the other — the Hempfield — beginning at Greensburgh, in Pennsylvania, more than three hundred miles from Philadelphia, and crossing the State of Virginia, and terminating in Wheeling in that State. The whole question was however opened and discussed, and the right of the city to subscribe to any road was denied. The case was very fully and ably argued, and the opinions of the judges seem to be carefully prepared. It will be a leading case upon the subject, and we regret that its great length prevents our giving even an abstract of the opinion of the judges.

United States Senate — Early Proceedings in. It cannot have escaped the observation of those who have attended to the legislative history of our country, that with the growth of our government the complexion of the Senate of the United States h s gradually varied from that which it appears to have worn in the infancy of our political institutions;

and that the character of its deliberations more and more nearly approaches that of the Representative Chamber.

The Senate, on its first organization under this Constitution, secluded itself from the public eye, and appears to have been considered rather in the light of a privy council to the President, than as a co-ordinate branch of the legislature. Indeed, if we mistake not, it was so termed in conversation occasionally, if not in official proceedings of that day. There are not many, probably, of the present generation of readers, who remember the fact, that in the first session of the first Congress of the United States, President Washington personally came into the Senate when that body was engaged on what is called executive business, and took part in their deliberations.

When he attended, he took the Vice-President's chair, and the Vice-President took that of the Secretary of the Senate; one or other of the Secretaries [heads of departments] occasionally accompanied the President on these visits. The President addressed the Senate on the questions before them, and in many respects exercised a power in respect to their proceedings which would now be deemed entirely incompatible with their rights and privileges. This practice, however, did not long continue. An occasion soon arose of collision of opinion between the President and the Senate on some nomination, and he did not afterwards attend, but communicated by message what he desired to lay before them.

At this period the legislative as well as executive proceedings of the Senate were always transacted in secret session, and the public knew of the proceedings of that branch of government only from its messages to the other House announcing its decisions. It became evident, however, that, in practice, all responsibility to the constituent under such circumstances was ideal; but it was not until the 20th of February, 1794, after a considerable struggle, that the Senate came to a resolution that its legislative proceedings should, after the end of that session, be public, and that galleries should be provided for the accommodation of auditors. On this question we find the yeas and nays registered, nineteen members having voted for it, and eight against it.

From the day of this triumph of popular principles the Senate has gradually parted with the character of reserve which appears to have belonged to it. By the increase of its members from the admission of new States into the Union, its legislative business has become so laborious that its peculiar character of an Executive Council is almost overlooked, notwithstanding the great importance of this feature in our government, and the debates in the Senate are of much greater length at this day, in proportion to the members composing the body, than those of the House of Representatives.

It has long been a subject of regret that the debates in the Senate have not been regularly reported; and we perceive that regret to increase, in proportion as the Senate acquires the popular character. We shall hereafter divide our attention more equally between the two branches of the legislature, and avail ourselves of any aid we can procure to give satisfactory reports of the proceedings in the Senate as well as in the House of Representatives for the National Intelligencer, as well as for a Congressional History, which we have an idea of undertaking. — *National Intelligencer, March* 11, 1818.

Judges no Judges in Transportation. — Some ancient judges of this country who are still alive, cling with great affection to transportation as a punishment. Lord St. Leonards thinks that transportation is "the best secondary punishment that has hitherto been devised in this country,"

and he submits to its discontinuance solely as "a necessity." Australia, he would seem to say, dictates, and he must submit; but if we had the power, we ought to continue transportation, on account of its beneficial effects Lord Campbell "regards transportation as the best secondary punishment that ever has been or could be devised; for it affords the best chance of reformi g criminals. He could say from his experience as a judge, that he believed it is a punishment which has a most salutary effect, which is not confined to the criminal on which it is inflicted. He therefore earnestly deprecated the discontinuance of transportation, and hoped that government would find out some other places in which that punishment might be carried out." Lord Brougham seems to sanction those views so far as to prefer "deportation" to the galleys; but "he would not say that the penitentiary system of this country might not be so greatly improved as to provide a fit and proper system of secondary punishments." If we could do that, there would be no occasion to find out "other places" for transportation, nor could any practical statesman follow Lord Campbell's advice.

So acute a man as Lord Brougham, who knows every thing, does not need to be informed that it has been necessary to discontinue transportation because it creates a state of society absolutely intolerable. If the criminal population is undiluted, as at Norfolk Island, it becomes a hell upon earth. If it is mixed with a virtuous population, as in Sydney or Van Diemen's Land, it becomes intolerable to the better part of society; and that is the reason why the present Colonial Secretary is obliged to fulfil the promise of previous Colonial Secretaries, by discontinuing transportation altogether. — *Spectator.*

Notices of New Books.

AN ESSAY ON THE LEARNING OF PARTIAL AND OF FUTURE INTERESTS IN CHATTELS PERSONAL. By WADE KEYES, of the Montgomery Bar. 1 Vol. 8vo. pp. 412. Montgomery, Ala.: Printed by J. H. & T. F. Martin. 1853.

This is a well-considered and carefully written book, by the author of the "Essay upon the Learning of Remainders," which was published last year, and mentioned by us. It supplies a deficiency that has been felt, and the profession will thank the Author for his labors. We give below, as the best notice of the book, the Table of Contents, which will exhibit the nature of the treatise, and its arrangement.

"CONTENTS.

CHAPTER THE FIRST. — Of the Nature of Chattels Personal; Of the different kinds; The reason why they are so called; Of the title to them; Of their position in our jurisprudence; Of the sources of this branch of the law.

CHAPTER THE SECOND. — Of the creation and construction of Partial and of Future Interests in Chattels Personal; and of the policy of allowing them.

CHAPTER THE THIRD. — Of Partial Interests *in præsenti.*

CHAPTER THE FOURTH — Of the different kinds of Future Interests in Chattels Personal.

CHAPTER THE FIFTH. — Of the Destructibility, Alienation, and Transmission of Interests in Chattels Personal.

CHAPTER THE SIXTH. — Of the Respective Rights of Persons having Prior and Subsequent Interests; and of their Remedies."

A Complete Practical Treatise on Criminal Procedure, Pleadings and Evidence, in indictable cases; with minute directions and forms for every criminal case that can arise either at common law, under the English Statutes, or under the Statutes of the different States; comprising the "New System of Criminal Procedure, Pleading, and Evidence," by Mr. Archbold; and also the twelfth and last London edition of "Archbold's Pleading and Evidence in Criminal Cases," by Messrs. Jervis and Welsby; to which are added comprehensive Notes on each particular offence, the accusation and complaint, process, arrest and examination, commitment, bail, indictment, trial, conviction, judgment, appeal, new trial, and execution; also, an Introductory Essay on Crimes and Punishments, by Thomas W. Waterman, Counsellor at Law. Sixth edit., in Three Volumes. New York: Banks, Gould & Co. 144 Nassau Street. Albany: Gould, Banks & Co. 475 Broadway. 1853.

We have examined this Treatise of Mr. Waterman with care, and assent to the following notice of it, which has come prepared to our hands. The commendation is well bestowed. We would call attention to a feature of the book not remarked upon in the notice. It states fully the changes that have been wrought in the criminal procedure in England by the Stat. 14 & 15 Vict. ch. 100; which Act was intended "to do away with the quibbles by which the administration of the criminal law was impeded." We gave in the Reporter for February, 1852 (14 Law Rep. 531) a full abstract of the Act. The Preamble is as follows—"Whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case; and whereas such technical strictness may safely be relaxed in many instances, so as to insure the punishment of the guilty without depriving the accused of any just means of defence; and whereas a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had, and the proof of names, dates, matters and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence, Be it enacted, &c." Mr. Archbold characterizes it as "One of the greatest and best reforms in the English criminal law which has ever been made;" and he further says, that "It is not only calculated to afford great and extraordinary facilities in the administration of criminal justice, but must in its consequences have a serious and most beneficial effect upon the state of crime in the country." We most fully concur in the opinion of Mr. Waterman upon this Act: "After a very thorough examination of it, I am inclined to think that it deserves this high encomium, and that it is worthy the careful study of the American Bar, and the early attention of American legislators."

The following is the notice to which we referred.

"A full, accurate, and well-digested treatise upon criminal law, as now understood and administered, has for a long time been greatly needed. We have had laid before us three volumes by Mr. Waterman, to which is prefixed the extended title-page at the head of this article. After a somewhat careful perusal, we have arrived at the conclusion that the work itself is justly entitled to just such a title-page. If so, it hardly needs commendation at our hands. The Treatise of Mr. Archbold upon Pleadings and Evidence in Criminal Cases, has been so long and so favorably known to the American bar, that to speak of it in terms of approbation would be but the work of supererogation. The fact that it has run through six editions within a comparatively short space of time, is evidence that its

intrinsic merit and excellence have been appreciated by the legal profession. Since its first publication it has been extensively cited with approbation both in England and America, and has very deservedly elicited the commendation of being 'one of the most succinct and accurate treatises upon criminal law extant.' It was, however, a purely English work. Its references were to English authorities. Some of the cases cited have not been followed in this country, under our more enlightened and humane system; others have been doubted or overruled by our judicial tribunals. Although it had a very extensive circulation, and has ever been highly valued as a book of reference, yet the bench and the bar of the United States have long felt the necessity of having it Americanized. This necessity has been fully and ably met in this edition of Mr. Waterman. Under his hands it has been not only thoroughly Americanized, but admirably *Stateized*, if we may coin a word to express our meaning. Henceforth its practical utility cannot be limited to any section of the United States; for his numerous and extended notes have in fact made it a most complete compendium of the criminal law of the respective States. The notes are many of them quite extended, and their value greatly enhanced by the fact that they are so full as to give, in a condensed form, an accurate synopsis of each case cited. To the professional man who has not access to an extensive library, the value of those notes is incalculable; for, to all practical purposes they may be consulted with safety, without a resort to the cases cited in the original books of reports. Nor are those notes confined exclusively to American cases; but they also embrace the modern decisions in criminal cases in England. Many subjects which are only touched by Mr. Archbold in the text in very general terms, have been amplified and illustrated in the notes: whilst many others, not even alluded to in the text, have been introduced and fully and accurately digested in the notes.

"Mr. Waterman has also so largely drawn upon the previous labors of the elementary writers on criminal law in England, that much of what they have done has been, so to speak, fused into his notes to such a degree as to supersede to a great extent the necessity of a resort to them by the American bar. He has also annotated from the Civil Law, that great perennial spring in the field of jurisprudence, which should ever be resorted to by the legal student, and which will be by all those who desire a thorough knowledge of the law as a science.

"The magnitude of Mr. Waterman's labors are evidenced by the fact, that whilst the text contains but 630 pages, in one volume, his edition, including the notes, is swelled to three large volumes, containing 2854 pages, with a full and complete index to the text, and to the American notes. We concede that prolixity is not a sure evidence of merit, but frequently the reverse; but still we think that this fault in this edition, if fault it be, is more than counterbalanced by the great mass of matter succinctly stated and accurately digested. Utility greatly preponderates over inutility.

"We had intended to have made numerous extracts from the notes, but must restrict ourselves to a single one from that under the head 'Insanity, how far a Defence in Criminal Prosecutions.'

"'In prosecutions for crimes, the defence of insanity is so frequently interposed as to render the subject one of prominent importance in criminal jurisprudence. A due regard for the ends of justice, and the peace and welfare of society, no less than mercy to the accused, requires that it should be thoroughly and carefully weighed.

"'Whether a man is sane or not, whether partially or totally deranged, and if only in part deranged, where accountability to the laws shall begin,

and where end, are questions of great and embarrassing subtlety. The laws of the sane mind are but little understood; much less are the laws, if indeed such phraseology is predicable of it, of the unsound mind understood. We can judge of the one by external developments, and by our own consciousness; of the other, only by external indicia. There are few men so balanced in intellect as not at some times, and upon some subjects, to approximate towards derangement. All men, almost, have some train of thought in which the mind delights to run, at a comparative abandonment of the ordinary routine of thought. Intellectual enthusiasm, not unfrequently, approaches the line of insanity. The numerous cases of mania, or delusion, which leave the mind sound in general, but as to certain things shattered or wholly obliterated, have increased the difficulty of any specific general rule as to the responsibility of those who are generally classed as insane. A crazy or partially deranged person, is a mystery; such a person is so by the *visitation of God*. The subject of insanity is not responsible — humanity, reason, the law so adjudges. To punish an insane man, would be to rebuke Providence. Hence, in all definitions of murder, of which I have knowledge, the requirement is found, that the slayer must be of sound mind. Our own statutory definition requires him to be 'a person of sound memory and discretion.' Accountability for crime presupposes a *criminal intent*, and *that* requires a power of reasoning upon the character and consequences of the act; a will subject to control. For this reason it is, that a homicide, committed under the influence of incontrollable passion, is not murder. The reason is dethroned, the will is not subject to control, and in tenderness to human infirmity he is considered as not having a malicious, murderous intent. The difficulty is to determine who is 'a person of sound memory and discretion,' who is incapable of a criminal intent, who is incapable of reasoning upon the character and consequences of the act, and who is without control over his will. That is the work, that the labor. Men are, upon proof of the criminal act, presumed to be responsible, and therefore the burden of proving irresponsibility devolves upon the defendant.

"'One does not fail to perceive, also, in looking into this subject, that the rules now recognised as governing pleas of insanity, are different from what they were in the time of Lord Coke, and indeed long subsequent to his day. The improvements in the science of medical jurisprudence, a more enlarged benevolence, and a clearer sense of Christian obligation, have relaxed the cruel severity of the earlier doctrines. The plea of insanity is now, as it ought to be, as much favored as any other plea resting upon the ground of reason and justice. Courts are now not afraid to trust the juries with the investigation of questions of insanity; nor are all cases now, as they once were, subjected to the application of one rule, unjust because of its sweeping generality. There was a time when the insane were looked upon as victims of Divine vengeance, and therefore to be cast out of the protection of human laws, and beyond the pale of human sympathies. Not so now. The insane hospitals of our land, founded by provision of public law, and by private charity, prove that the insane are the peculiar care of the State as well as of private benevolence.

"'As late as 1723, it was held, in England, that for a man to be insane, *he must have no more reason than a brute, an infant, or a wild beast.*

"'It seems then to have been believed, that for derangement to protect its subject from criminal responsibilities, it must be total in its character; either manifesting itself in wild, ungovernable and incongruous actions, or in stupid and passive imbecility. It seems not to have been then understood that men might ordinarily act sensibly, and yet be insane; and reason acutely or learnedly upon most subjects, whilst they were upon some one or more totally deranged. This inhuman rule cut off from the

benefits of this plea all the partially insane, and admitted to its privileges only the raving maniac or the drivelling idiot.' See opinion of the court in the case of *Roberts* v. *The State of Georgia*, (3 Kelly's Rep. 310.)

"'Insanity may be divided into *dementia accidentalis*, or adventitious insanity; and *dementia affectata*, or voluntary insanity.

"'Those who labor under the first-mentioned kind, are such as have had understanding, but have lost the use of their reason, by disease, grief, or other accident. 1 Black. 304. When the affliction is permanent, constant, and total, it is called *madness*. When it is temporary, the subject only being afflicted at times, enjoying lucid intervals when his reason returns, it is called *lunacy;* the name of *lunacy* being taken from the influence which the moon was supposed to have in all disorders of the brain, a notion which has been exploded by the sounder philosophy of modern times.

"'Voluntary insanity is that which is produced by intoxication, which puts men in a temporary frenzy.

"'Where the insanity is total, fixed, and permanent, it excuses all acts; so, likewise, during the frenzy, in the case of a man laboring under adventitious insanity. 'But the difficulty in these cases is to distinguish between a total aberration of intellect, and a partial or temporary delusion merely, notwithstanding which, the patient may be capable of discerning right from wrong; in which case he will be guilty in the eye of the law, and amenable to punishment. Partial insanity, says Lord Hale, is the condition of many, especially of melancholy persons, who generally discover their defects in excessive fear and grief, and yet are not wholly destitute of reason; and this partial insanity seems not to excuse them in the commission of any crime. 1 Hale, 30. Doubtless, he adds, most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences. It is very difficult to define the invisible line that divides perfect from partial insanity; but it must rest upon circumstances, duly to be weighed and considered both by the judge and the jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great indulgence given to great crimes. It seems clear, that to excuse a man from punishment upon the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature. If there be a partial degree of reason, a competent use is sufficient to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, he will be responsible for his actions. Whether the prisoner were sane or insane at the time the act was committed, is a question of fact triable by jury, and dependent upon the previous and contemporaneous acts of the party.' See Arch. Cr. Pl. and cases cited.'

"We consider this edition the most elaborate and complete ever published in this department of the law. It ought to find a place on the shelf of every lawyer. It should be consulted by every criminal magistrate. It may well be studied with interest and profit by every citizen."

New Publications received.

English Reports in Law and Equity. Vol. XIV. pp. 672. By Edmund H. Bennett and Chauncey Smith. Containing cases in the House of Lords, the Queen's Bench, Common Pleas, and Exchequer; the Court of Criminal Appeal and the Ecclesiastical Courts, during the years 1852–53. Boston: Little, Brown & Co. 1853.

WILLIAM P. SHARPLESS ET AL. *v.* THE MAYOR &c. of PHILADELPHIA; in the Supreme Court of Pennsylvania. In Equity. Brief of arguments of complainant's and respondent's counsel, and respondent's answer.

THE GREAT COLLISION CASE. E B. Ward, et al., Owners of the Steamer Atlantic, *v.* The Propeller Ogdensburgh, and Chamberlain & Crawford, the owners. In Admiralty. Tried and determined at Columbus, in the District of Ohio, at the April Term U. S. District Court, A D. 1853. Hon. Humphrey H. Leavitt, Judge Reported by F. D. Kimball. Esq., from original minutes taken on the trial. Cleveland: Printed by Harris & Fairbanks. 1853. Paper. pp. 81.

THE CONSTRUCTION OF THE STATUTE OF LIMITATIONS of 1843, and the Decisions of the Supreme Court of Alabama thereon. Examined by K. B. SEWALL. "Judgments are the anchors of the laws, as the laws are the anchors of States." Mobile: Office of the Evening News. 1853. Paper. pp. 59.

Obituary Notice.

DIED, at Springfield, Massachusetts, 25th August, 1853, JAMES BENJAMIN, Esq. a member of the Suffolk Bar.

The death of any upright man, in the prime of life, who has been thoroughly educated, and has proved himself able and faithful in the discharge of a liberal profession, is always a public loss, and in some sense demands a public notice. By such a death, the community loses the benefit of an intelligence trained to conduct to a successful issue the complicated and critical affairs of life, and of a foresight and sagacity fitted to point out a safe path for the energy of others, or to extricate from difficulties and embarrassments, which the most prudent cannot always avoid. Then passes away from the life and use of man a matured judgment, a courage to assume responsibility, and a competency to discharge it; a proved and admitted fidelity to duty, resource enriched by experience, a rectitude both intrinsic and enlightened, knowledge of character, a liberal interpretation of the motives of men, and the feeling of repose and reliance enjoyed by those who are brought into relations with such a man. The public is rich in proportion to its accumulation of such characters, and the loss of any such mind and character so far impoverishes it.

Mr. Benjamin, though not widely known, had an influence and power of character which eminently illustrated these remarks. He was educated at Harvard College, bred to the profession of the law, in the office of William Minot, Esq. of Boston, and admitted to the bar of Suffolk County in the year 1834. A taste for retirement, a disinclination to try causes of which the issue could not be made nearly certain by careful preparation before trial, a certain mistrust, perhaps not ill-founded, of the competency of juries to arrive at accurate results, a love of certainty arising from the mathematical character of his mind, and a total absence of vanity, or love of excitement, prevented his becoming conspicuous as an advocate at the bar; and, with occasional exceptions, in which he displayed marked ability, he confined himself to chamber practice. To this unnoted, but very important branch of the profession, he brought rare qualities of mind and character. His mind was thoroughly imbued with the principles of the common law, and by a rapidity of legal reasoning, which seemed almost intuitive, he applied those principles with great accuracy to the most complicated matters of business. Perplexing and intricate questions, when presented to his mind, were resolved, as if by a chemical process, into the sharp, well-defined and crystalline forms of their legal relations, and with these as a basis, his mind moved by steps of the purest legal reasoning and induction to the conclusion on which alone his client could safely stand. His capacity of marshalling facts under the legal principles which controlled them, was

very remarkable; and his power of applying these principles in all their purity, uncorrupted by the fallacies of false logic, made him competent to the clear and satisfactory solution of any questions however new and involved. He was not a great reader of cases, but loved and studied the elementary works; and the law was to him a pure science of principles, not a collection of authorities. In his early life he had a great taste for mathematics, and the accuracy, pure reason and certainty of mathematical science, strongly imbued his love and studies of the law. But he had combined with this power of legal reasoning much richness and felicity of thought, which gave freshness and originality to his mental operations, and were mainly the cause of his singular power of clearly and satisfactorily leading others to the conclusions on which his own mind rested. His arguments and discussions had a rare clearness and transparency, with which conviction went so hand in hand, that it was a great intellectual pleasure to listen to them. He added to and enriched this power with an admirable force of illustration. His illustrations were, as Walter Scott calls them, dangerous weapons, but they were dangerous to his adversary, and not to himself. They were singularly felicitous, complete, and unassailable. Drawn usually from familiar, and almost homely objects, they had none of the charm of poetry, but all the beauty of truth irradiated. An obscure relation, not easily comprehended, started by the force of these into noon-day clearness; and out of a mass of indefinite shadows and glimpses of truth, he furnished a guide, not so much of authority as of unanswerable reason and conviction.

His temper was admirably fitted for the exercise of those intellectual powers. It was calm, placable, self-reliant, and cautious. He trusted to the power of conviction alone to influence others; of conviction enforced by temperate, but decisive argument. However harassed, he rarely allowed himself to become irritated; and as he had the power of condensed and epigrammatic sarcasm, this merit of good temper was due not less to self-control than to nature. The only form of character which excited his uncontrolled indignation, was ignorance seeking to cloak itself under duplicity and meanness; and against this combination his rebuke was sharp and condensed. He hated falsehood and dishonesty. They were abhorrent alike to his incorruptible integrity and to his clear, straight-forward mind. In all questions of moral conduct, his judgment was nice and decisive. No man could be more thoroughly honest — he seemed indeed to be above temptation. His views of right and wrong were unbiassed by the artificial distinctions which sometimes cloud the judgment in the complicated relations of a highly artificial state of society. His sense of justice knew no degrees of comparison, no shades or variety of color; but he walked through life on the right side of a clear and well-defined line of conduct. But the severity of his judgment over his own actions, he charitably mitigated in his opinion of others. Few men have said less harsh things of others; and certainly he never said an ill-natured thing.

The great defect of Mr. Benjamin's character, was his total absence of ambition — of that ambition which seeks to find the largest sphere for one's faculties, and to reap the most abundant harvest of labor. He took the responsibilities of life, as they were forced upon him; he had no desire or enterprise to seek them out. When the occasion came, he did his duty with the thoroughness and strength of a clear intellect, and a compelling conscience. But he did not seek to multiply those occasions. Endowed with talents which entitled him to take a very high place in his profession, he was yet content to follow the paths of a comparatively subordinate one. Nor had he those qualities which sometimes supply, though imperfectly, the want of an enlarged ambition; he had no vanity, no love of notoriety or praise, and was indifferent to wealth and its enjoyments. Accident might have made him distinguished, for he was intellectually adequate to any occasion, but life had for him no interests keen enough, no temptations strong enough, to arouse his somewhat sluggish temperament. With his duty done, was ended the spring to exertion. His conscience was iron, and his intellect was electric, and played brilliant and beautiful over the lines and pathways of his duties, but beyond this the attraction was lost, and the vivifying power failed to operate.

Probably the consciousness that the seeds of early death were sown in his system, repressed his energies, and imparted a seriousness, and at times almost solemnity to his thoughts and manners. His sympathies, though strong, were not quick; and without ready and comprehensive sympathies, a man's influence is narrowed to the circle of his immediate friends. But with these Mr. Benjamin was social, and full of cordial interest. And to those who knew him well, he appeared so faithful a friend, so devoted a relative, so sound and reliable an adviser, so capable and conscientious in the exercise of his profession, and withal so peculiar, original, and excellent in his character, as to leave only the regret that his life was so short, and that he departed so little known and appreciated.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Amadon, Ethel T.	Springfield,	Aug. 27,	Henry Vose.
Anderson, William	Deerfield,	" 6,	David Aiken.
Barber, Isaac W.	Springfield,	" 15,	Henry Vose.
Barrett, James E. et al.	Chelsea,	" 8,	John P. Putnam.
Bartlett, William	Framingham,	" 20,	Asa F. Lawrence.
Bauer, Augustus	Dedham,	Sept. 9,	Samuel B. Noyes.
Beals, Luke	Winchendon,	July 23,	C. H. B. Snow.
Bemis Lorenzo	Spencer,	Aug. 22,	Henry Chapin.
Billings, Merick H.	Greenfield,	June 15,	David Aiken.
Brigham Elijah, Jr.	Wayland,	Aug. 30,	Josiah Rutter.
Bright, Winslow	Boston,	" 22,	John M. Williams.
Cobb, Hiram	Boston,	" 23,	John P. Putnam.
Crosby, Charles W.	West Roxbury,	" 20,	John P. Putnam.
Cushman, Nelson	Stoughton,	" 24,	Samuel B. Noyes.
Ellis, Billings	Walpole,	" 27,	Samuel B. Noyes.
Fairbanks, Artemas E.	Leominster,	Sept. 7,	C. H. B. Snow.
Field, Thomas B.	Nantucket,	Aug. 24,	George Cobb.
Filley, Chloe	Greenfield,	March 14,	David Aiken,
Gilbert, Lucius J.	Sunderland,	" 14,	David Aiken.
Graham, Lucius	Greenfield,	June 15,	David Aiken.
Green, Timothy	Spencer,	Aug. 25,	Henry Chapin.
Hall, Richard H.	Lawrence,	" 12,	N. W. Harmon.
Harris, Beriah	Coleraine,	June 25,	David Aiken.
Hawley, Ebenezer S.	Hadley,	Aug. 23,	Haynes H. Chilson.
Heustis, Simon B.	Boston,	" 29,	John M. Williams.
Isbett, Oliver C. et al.	Boston,	" 31,	Charles Demond.
Jones, Thomas P.	Chelsea,	" 4,	John M. Williams.
Jones, Russell L.	Coleraine,	March 16,	David Aiken.
Leach, Whitman	Orange,	July 7,	David Aiken.
Leonard, Lucius H.	West Springfield,	June 16,	Henry Vose.
Lewis, Daniel G.	Lynn,	Aug. 9,	John G. King.
Luther, Jonathan	Worcester,	" 20,	Henry Chapin.
Marcy, Volney A.	Charlestown,	" 9,	Asa F. Lawrence.
McCulloch, William D.	Oakham,	" 19,	Charles Brimblecom.
Murphy, Francis	Roxbury,	" 24,	Francis Hilliard.
Nourse, Aaron	Salem,	" 8,	John G. King.
Ordway, John P.	Boston,	" 13,	Charles Demond.
Page, Philip C.	Somerville,	" 5,	Asa F. Lawrence.
Payson, J. Wentworth	Boston,	" 18,	John P. Putnam.
Pope, Samuel	Boston,	" 18,	Charles Demond.
Preston, James H.	Holyoke,	July 22,	Henry Vose.
Rawson, Harrison R.	Gardner,	Aug. 10,	C. H. B. Snow.
Richardson, Edward	Rutland,	" 29,	Henry Chapin.
Richardson, Theodore S.	Woburn,	" 15,	Asa F. Lawrence.
Rogers, Jesse	Petersham,	" 26,	Charles Brimblecom.
Russell, Willard	Andover,	" 13,	John G. King.
Salisbury, Henry	Lawrence,	July 19,	N. W. Harmon.
Sawyer, Charles L.	Wendell,	May 5,	David Aiken.
Sontra, Benjamin A.	Cambridge,	Aug. 31,	Asa F. Lawrence.
Standley, Samuel S.	Salem,	" 19,	John G. King.
Stowell, Austin C.	Chelsea,	" 6,	John P. Putnam.
Sumner, Samuel R.	Somerville,	" 9,	Asa F. Lawrence.
Symonds, John H.	Boston,	" 3,	Charles Demond.
Tisdale Stephen A.	Leominster,	June 22,	C. H. B. Snow.
Vincent, Joseph	Nantucket,	Aug. 29,	George Cobb.
Warren, Thomas D.	Boston,	" 9,	Charles Demond.
Watson, George	Spencer,	" 16,	Henry Chapin.
West, Daniel	Lowell,	" 20,	Asa F. Lawrence.
Wheeler, John H.	Fitchburg,	" 25,	C. H. B. Snow.
White, William H.	Wrentham,	" 1,	Francis Hilliard.
Whitney, Edwin D.	Shelburne,	July 28,	David Aiken.
Wood, Charles J.	Wayland,	Aug. 16,	Josiah Rutter.
Woods, George et al.	Boston,	" 31,	Charles Demond.

LAW SCHOOL OF THE UNIVERSITY AT CAMBRIDGE.

THE INSTRUCTORS IN THIS SCHOOL, ARE

HON. JOEL PARKER, LL. D., Royall Professor.

HON. THEOPHILUS PARSONS, LL. D., Dane Professor.

HON. EDWARD G. LORING, University Lecturer.

The design of this Institution is to afford a complete course of legal education for gentlemen intended for the Bar in any of the United States, except in matters of mere local law and practice; and also a systematic, but less extensive course of studies in Commercial Jurisprudence, for those who intend to devote themselves exclusively to mercantile pursuits.

The course of instruction for the Bar embraces the various branches of the Common Law; and of Equity; Admiralty; Commercial, International, and Constitutional Law; and the Jurisprudence of the United States.—Lectures are given, also, upon the history, sources, and general principles of the Civil Law, and upon the theory and practice of Parliamentary Law.

The Law Library consists of about 14,000 volumes, and includes all the American Reports, and the Statutes of the United States, as well as those of all the States, a regular series of all the English Reports, the English Statutes, the principal Treatises in American and English Law, besides a large collection of Scotch, French, German, Dutch, Spanish, Italian, and other Foreign Law, and a very ample collection of the best editions of the Roman or Civil Law, together with the works of the most celebrated commentators upon that Law.

Instruction is given by oral lectures and expositions, (and by recitations and examinations, in connection with them,) of which there will be ten every week.

Two Moot Courts are also holden in each week, at each of which a cause, previously given out, is argued by four students, and an opinion delivered by the presiding Professor.

The applicant for admission must give a bond, in the sum of $200, to the Steward, with a surety resident in Massachusetts, for the payment of College dues; or deposit, at his election, $150 with the Steward, upon his entrance, and at the commencement of each subsequent term, to be retained by him until the end of the term, and then to be accounted for.

Students may enter the School in any stage of their professional studies or mercantile pursuits. But they are advised, with a view to their own advantage and improvement, to enter at the beginning of those studies, rather than at a later period.

The course of studies is so arranged as to be completed in two academical years; and the studies for each term are also arranged, as far as they may be, with reference to a course commencing with that term, and extending through a period of two years; so that those who are beginning the study of the law may enter at the commencement of either term, upon branches suitable for them. Students may enter, also, if they so desire, in the middle, or other part of a term. But it is recommended to them to enter at the beginning of an Academical year, in preference to any other time, if it be convenient. They are at liberty to elect what studies they will pursue, according to their view of their own wants and attainments.

The Academical year, which commences on Thursday, six weeks after the third Wednesday in July (27 August, 1851,) is divided into two terms, of twenty weeks each, with a vacation of six weeks at the end of each term.

During the winter vacation, the Library will be opened, for the use of those members of the School who may desire it.

The tuition fees are $50 a term, and $25 for half or any smaller fraction of a term; which entitles the student to the use of the College and Law Libraries, and Text Books, and a free admission to all the Public Lectures delivered to undergraduates in the University, comprising Lectures on Anatomy; on Mineralogy and Geology; on the Means of preserving Health; on History; on Rhetoric and Criticism; on Botany; and on Physics and Astronomy.

Students who have pursued their studies for the term of eighteen months in any law institution having legal authority to confer the degree of Bachelor of Laws, one year of said term having been spent in this School; or who, having been admitted to the Bar after a year's previous study, have subsequently pursued their studies in this School for one year, are entitled, upon the certificate and recommendation of the Law Faculty, and on payment of all dues to the College, to the degree of Bachelor of Laws.

Prizes are awarded, annually, for dissertations.

Applications for admission may be made to either of the Professors at Cambridge.